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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INC., APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JANUARY 6, 1941.

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[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

CASKEY BAKING COMPANY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee

Petition for Writ of Error From the Corporation Court of the City of Winchester

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

I. KIND OF SUIT

This is a criminal action for violation of section 192b of the Tax Code, originating by the Police Justice of the City of Winchester, upon whose warrant petitioner was found guilty. This warrant was issued on September 9th, 1938, upon the complaint of C. P. McVicar, Commissioner of Revenue of the City of Winchester, and charged petitioner with selling or offering for sale, goods, wares and merchandise to a licensed retail merchant without having obtained the license required by the aforesaid section of the Tax Code. Upon appeal, petitioner was found guilty by the Corporation Court of the City of Winchester, on the — day of ——, 1940, and fined —— dollars and costs. The sentence was suspended for a period of sixty days so that petition for a writ of error might be made here.

A transcript of the record, including the opinion of the [fol. 2] Judge of the Corporation Court, who tried the case without a jury, as determined and settled by that Court, is hereby exhibited, from which it appears that the Supreme Court of Appeals has jurisdiction.

Your petitioner is advised and represents to the Court that the judgment and order of the Corporation Court of the City of Winchester is erroneous, and that your petitioner is aggrieved thereby in the following particulars:

II. ASSIGNMENTS OF ERROR

1. Section 192b of the Tax Code of Virginia, as amended by the Acts of 1938, chapter 305, as applied to your petitioner, is unconstitutional and void, in that

(a) It discriminates against your petitioner.

(b) It denies to your petitioner equal protection of the laws of Virginia.

(c) It places an improper burden on interstate commerce.

2. By enacting the statute, having reference to section 73 of the Tax Code, the General Assembly usurped the powers of Congress under Art. 1, section 8, clause 3 of the Constitution, which provides that Congress shall have the power to regulate commerce between the States.

III. Statement of Facts

There is a stipulation of facts in the record. No evidence was taken before the Police Judge. In the Corporation Court, instead of taking evidence, there was a stipulation as to the facts, without waiving the right of either party to object on the ground of immateriality.

The condensed facts are as follows:

The Caskey Baking Company, Incorporated, a West Virginia corporation, domiciled in the City of Martinsburg, in that State, and domesticated in Virginia, was and is engaged in making and selling bread to retail dealers in the territory tributary to Martinsburg. This company has paid its annual registration fees and the State income tax upon its net profits allocable to its Virginia business.

After the manufacture of the bread by petitioner, it was brought to the State of Virginia by motor vehicles and sold [fol. 3] from place to place from these trucks to licensed retail merchants. These trucks operated over regular routes at regular intervals. The trucks belong to petitioner and were operated by employees, who were paid a fixed salary and who had no interest in the merchandise nor in the proceeds from such sales. Manifestly, as it was agreed, the bread sold was not injurious to the health nor damaging to the morals of the citizens of Virginia.

The petitioner here had no place of business in Virginia; had no property permanently located in Virginia; was not a manufacturer taxable on capital in Virginia; was not a distributor of manufactured products in Virginia on its purchases; and was not a licensed wholesale dealer.

The petitioner, at the time of the service of the warrant, towit, September 9th, 1938, had not secured the license prescribed by section 192-b of the Tax Code, and on that day

sold and delivered bread from its truck in Winchester to Mr. J. E. Keffer, a licensed retail merchant, the bread so sold and delivered being manufactured by petitioner in Martinsburg, West Virginia, and brought to Winchester, Virginia, in the truck from which it was taken to be sold and delivered.

IV. Questions Involved Here

The Corporation Court of the City of Winchester upon the warrant, issued upon the complaint of C. P. McVicar, found the defendant below, petitioner here, guilty and fined petitioner, as set out in the record. Judge Williams filed a written opinion which he made part of the record.

The questions involved here are:

1. Is section 192-b of the Tax Code of Virginia, as amended by Acts of 1938, chapter 305, as applied to your petitioner, unconstitutional and void, because—

(a) It discriminates against your petitioner?

(b) It denies to your petitioner equal protection of the laws of Virginia?

(c) It places an improper burden on interstate commerce?

2. Did the General Assembly, by enacting section 192-b of the Tax Code, having reference to section 73 of the Tax Code, usurp the powers of Congress under article 1, section 8, clause 3 of the Constitution, which provides that Congress shall have the power to regulate commerce between the States?

[fol. 4] Points and Authorities

The Tax Imposed Is a Revenue Measure

A license tax imposed for the unconditional right of peddling is a revenue tax.

Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

Discrimination, Unequal Protection of the Laws

14th Amendment, Federal Constitution. Sec. 201 Tax Code of Virginia.

Classification of objects for taxation is permissible but the classification must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treasted alike.

Norfolk v. Griffin Bros., 120 Va. 534, 91 S. E. 640;
Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299;
State Bd. Tax Comrs. v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248;
Smith v. Farr (Colo.), 104 Pac. 401.

Regard must be had to the particular subject of action.

Smith v. Cahoon, 203 U. S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264.

Mere difference is not enough, discriminations cannot stand if they offend the plain standards of a common sense.

Hartford Steam Boiler Inspection & Ins. Co., v. Harrison, 301 U. S. 459, 75 Sup. Ct. 838, 81 L. Ed. 1223.

If the condition precedent of the statute cannot be satisfied by a non-resident manufacturer without the imposition of a burden which the resident escapes, there is a real discrimination and an offense against the Fourteenth Amendment, if both corporations are within the State. Moreover it is a burden on interstate commerce.

Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 67 L. Ed. 1029.

After being domesticated in Virginia, the appellant is put on a level with domestic corporations of the same kind, stands equal with them, and any tax laws made to apply after it has been so received into the State are to be regarded as laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment.

[fol. 5] Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 Sup. Ct. 179, 71 L. Ed. 372.

If there be an injurious discrimination against goods because of their source, the act is unconstitutional.

Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915;
Bethlehem Motors Corp. v. Flynt, supra.

Interstate Commerce

Art. 1, Sec. 8, Cl. 3, Federal Constitution

A license tax on the right to sell the goods is a tax on the goods.

Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719.

Likewise a tax on the business itself.

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934.

A tax on the right to carry on business at all is a direct burden on interstate commerce.

Pullman's Palace Car Co. v. Commonwealth of Penna., 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

The appellant's method of doing business in interstate commerce.

Wagner v. Covington, 251 U. S. 95, 95 Sup. Ct. 104, 64 L. Ed. 157;
Sault Ste. Marie v. International Transit Co., 234 U. S. 353, 34 Sup. Ct. 826, 58 L. Ed. 1337;
Commonwealth v. Myer, supra;
Bethlehem Motors Corp. v. Flynt, supra.

License tax statutes are construed liberally in favor of the citizen against the government.

Watts v. Comm., 106 Va. 851, 56 S. E. 223;
Brown v. Comm., 98 Va. 336, 36 S. E. 485.

What Is Capital and Where Taxable?

Sec. 73, Tax Code of Virginia

For the purpose of taxation, intangible property acquires a situs at the domicile of the creditor.

Virginia v. Imperial Sales Co., 293 U. S. 15, 55 S. Ct. 12, 79 L. Ed. 171;
[fol. 6] Smith v. Ajax Pine Line Co., 87 F. (2d) 567, cert. den. 300 U. S. 677, 57 S. Ct. 670, 81 L. Ed. 882;
Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143;
First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061;
Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1339.

The Exemption Granted Other Peddlers as a Comparison

Sec. 192 of the Tax Code exempts peddlers of milk, butter, eggs and family supplies of a perishable nature, if grown or produced by them. If not grown or produced by them a license tax of $50.00 is demanded. It also exempts seafood peddlers entirely unless they buy from the person catching or taking the same, when a license tax of $25.00 is demanded. Seafood peddlers are exempt from sec. 192 b.

There is no distinction between the carriage of one foodstuff and carriage of another.

Smith v. Cahoon, supra.

Bread is an article of food sold for immediate consumption.

Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459.

ARGUMENT

The fee demanded of the defendant by the Commonwealth under section 192-b of the Tax Code, is nothing more or less than a license tax imposed for the unconditional right of peddling. It is not a tax on property, personal or real, nor a sales tax. It is purely a revenue measure.

Phoebus v. Manhattan Social Club, 105 Va. 144, 55 S. E. 839.

I

Legislation may be adjusted to differences in things and situations, but it is limited to the extent that the 14th Amendment of the Federal Constitution demands that it make no unreasonable or arbitrary classification or discrimination, which amendment requires the same methods to be applied to all the constituents of the class subjected to the taxation and equal and uniform operation upon all persons in similar circumstances.

Under this head it will be noted that Section 192-b exempts [fol. 7] from its provisions, a distributor or vendor of motor vehicle fuels and petroleum products, tobacco, seafood, and a manufacturer taxable on capital by Virginia, or a distributor of manufactured goods paying a State License on his purchases.

And under Section 201 of the Tax Code it will be noted that a person can retail, and therefore peddle, tobacco by paying an annual State license tax of Five Dollars ($5.00).

Section 192-b provides for a license tax of no less than One Hundred Dollars ($100.00) for each vehicle used in the peddler's business.

It, therefore, appears from those considerations that the appellant occupies a position under 192-b, which is by no means on an equality with the persons exempted thereby. The exempted parties have an absolute right to peddle their products without paying the tax under 192-b. True, some of those exempted are paying taxes in another capacity, but those taxes are not for the privilege of peddling. They are for the rights and benefits which accrue to them as residents of Virginia. For that matter the applicant is likewise paying such taxes in West Virginia and has been domesticated in Virginia to carry on its business of selling bakery products.

The only difference between the appellant and a manufacturer resident in Virginia is this: the appellant manufactures in another state, and sells in Virginia in exactly the same manner as the resident bakers. Both the resident manufacturer and the appellant pay income taxes on their Virginia business. The resident pays a tax on his capital, the defendant does not, and the latter has paid a tax for the privilege to do business as a corporation in Virginia.

Regardless of the tax structure of Virginia and the economic forces moving to lay taxes in order to equalize the burden, a tax on capital cannot be used as an excuse to exempt a person in the same class (peddlers) with others, from paying for the privilege to do that which for others in the same class a tax is imposed. The summation of that situation is that both have a privilege for the exercise of which one must pay, the other not. The privilege has always been present, and the statute recognizes it.

A more practical application of the unlawful exemptions in the statute is disclosed, however, by a consideration of the exempted persons. A peddler of sea food can peddle a foodstuff without paying the tax. Is there any real distinction between a peddler of sea food, and a peddler of bakery products? Each is selling nothing more than a foodstuff. Should not the sea food peddler share his burden of taxation if that be the purpose of the statute? Obviously [fol. 8] there is no more reason to tax a peddler of one food and exempt a peddler of another.

Likewise a peddler of tobacco. He can carry on his vocation after the payment of Five Dollars ($5.00) license

tax. There could not be any relation between peddlers of tobacco, sea food and bakery products, so different so far as revenues are concerned, that the discrimination could run the range of license taxes from zero to One Hundred Dollars ($100.00).

Admitted is it that for the purpose of taxation a State may classify objects of the tax. But the classification so made must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated or circumstanced shall be treated alike. Norfolk v. Griffin Bros., 120 Va. 534, 91 S. E. 640. Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299. State Bd. Tax Comrs. v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248. Regard must be had to the particular subject of action. Smith v. Cahoon, 203 U. S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264. Mere difference is not enough, discriminations cannot stand if they offend the plain standards of common sense. Hartford Steam Boiler Inspection and Ins. Co. v. Harrison, 301 U. S. 459, 75 Sup. Ct. 838, 81 L. Ed. 1223.

Realizing that the object of Section 192-b is to provide revenue, and recognizing the mandates of the above citations, no substantial difference between a peddler of one foodstuff and the peddler of another can be found. How could the vendor of one food be different from another? Each peddler is similarly situated; the plain standards of common sense are offended. Smith v. Cahoon, supra, is an apt illustration of how true this is.

II

Regardless of the above discrimination, section 192-b has a further effect, wherein it exempts a manufacturer taxable on capital by Virginia. To escape the tax the foreign manufacturer must set up a factory in Virginia or become a wholesaler or distributor of manufactured goods. The only argument against this charge of inequality in this regard is that it applies alike to non-resident as well as resident manufacturers, the inference being, as suggested by Armour v. Virginia, 118 Va. 242, 87 S. E. 610, 246 U. S. 1, 38 Sup. Ct. 267, 62 L. Ed. 547, that its condition can be as easily met by the non-resident as by the resident manufacturer, [fol. 9] and therefore it discriminates against neither. But there is no sound basis in this. An identical situation was

considered in Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. Ed. 1029. Said Justice McKenna:

"To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State, it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products in the first instance being within the State, Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state."

Since the appellant is a corporation domesticated in Virginia, it meets the mandate of that case decided after Armour v. Virginia, supra, which is not applicable to the case at bar, and if it were, has been, to that extent, impliedly overruled.

Moreover, the appellant being a domesticated corporation in Virginia, has the further protection of Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 57 Sup. Ct. 179, 71 L. Ed. 372, which determined that after its admission, a foreign corporation is put on a level with domestic corporations of the same kind, stands equal with them, and any tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment.

Therefore, because the appellant, in order to escape the tax, must change its method of doing business, and become a wholesaler, or distributor, or resident manufacturer, taxable on capital, it has been discriminated against. Especially so when sea food peddlers, tobacco peddlers, and manufacturers taxable on capital by Virginia, need not change their method of selling, and the manufacturer taxable on capital by Virginia need not become a wholesaler or distributor. This answers the opinion of the lower court that the defendant could escape the ta_ by coming into Virginia and setting up its business to coincide with the exemptions.

[fol. 10]

III

If there be an injurious discrimination against goods because of their source, the act is unconstitutional.

In Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915, a statute identical with section 192-b was under considera-

tion. And the corporation in that case occupied the same extrastate position as the Caskey Baking Company, except that it had not been domesticated in Virginia. It sold its products as a peddler, through a non-resident agent, who was the defendant. For failure to pay a peddlers license tax the agent was found guilty. The statute exempted a manufacturer taxable on capital by Virginia. Said Judge Keith:

"A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the Commonwealth without incurring the penalties denounced by Section 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and does deprive the citizen of another state of the privileges and immunities possessed by citizens of this state, and is an infringement of the provisions of the constitution and therefore void."

How applicable to the case at bar. It cannot be imagined that any manufacturer in Virginia corporate or natural, even though manufacturing without the state, is not taxable on capital by Virginia. Sec. 73 of the Tax Code is too inclusive to argue otherwise. It is apparent then, under Commonwealth v. Myer, supra, and cases there cited, that not only the appellant's goods are being discriminated against because it has not seen fit to be forced into Virginia to manufacture, a result condemned by Bethlehem Motors Co. v. Flynt, supra, but that the appellant itself is being injured.

Taxable on Capital

When it is realized that the situs of the ownership of intangible capital, as defined by said sec. 73, is the domicile of the creditor or the owner, the discrimination against a non-resident or goods of non-resident origin, becomes [fol. 11] more apparent. Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 55 Sup. Ct. 12, 79 L. Ed. 171, in interpreting sec. 73, held that money on hand and bills of account receivable have their situs, for purposes of taxation in Virginia. Moreover, as was held also by Smith v. Ajax Pipe Line Co., 87 Fed. (2d) 567, cert. den., 300 U. S. 677, 57

Sup. Ct. 670, 81 L. Ed. 882; Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 Sup. Ct. 773, 80 L. Ed. 1143; First Bank Stock Corporation v. Minnesota, 301 U. S. 234, 57 Sup. Ct. 677, 81 L. Ed. 1061; Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1939, all intangibles have their taxation situs at the domicile of the creditor or owner. The last named case even holding the same in reference to bank deposits.

Now, how could any resident manufacturer of Virginia escape taxation on capital by Virginia? It is impossible, regardless of the business the resident might do. Even if manufactured in another state, he would still be taxable on capital by Virginia. Obviously, then, the exemption of sec. 192-b, given to manufacturers, taxable on capital by Virginia, is a subterfuge used to veil the real intent of the statute. It could have no other purpose.

The same applies to goods of non-resident origin. If a manufacturer of Virginia taxable on capital peddles them he is exempt because under sec. 73, it is impossible for him not to be untaxed on capital. The exempting provision of the statute is an illegal piece of shrewd legislation. Knowing that no non-resident could, at first instance qualify, the legislature immediately discriminated against goods of foreign origin, protecting local manufacture and manufacturers. Said Mr. Justice Field, in Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347:

"It is sufficient to hold now that the commercial power (of the Federal Government over a commodity) continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

From these considerations it must be apparent that the "taxable on capital" exemption is nothing more than a veiled discrimination, which when brought to light, discloses [fol. 12] the obvious intent of the statute to protect local manufacturers to the detriment of those in the same situation as the appellant. No discrimination could be more selective and detrimental in its application.

Interstate Commerce

The lower court relied strongly on Wagner v. Covington, 251 U. S. 95, 95 Sup. Ct. 104, 64 Ed. 157; Home Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754, and Emert v. Missouri, 156 U. S. 296, 39 L. Ed. 430, for sustaining the proposition that peddling is interstate commerce. These cases simply hold that because the tax was uniform on all peddlers, interstate commerce was not burdened. They recognize that the carrying of the goods over the state lines is interstate commerce. Said Mr. Justice Pitney in Wagner v. Covington: "Of course the transportation of plaintiff's goods across the state line is of itself interstate commerce." And quoting from Robbins v. Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, he further said:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way."

It was because of the lack of discrimination that the taxes were upheld.

In fact a license tax required for the sale of goods is a tax on the goods themselves. Brennah v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. It is a tax on the business. Cooney v. Mountain States Relephone and Telephone Co., 294 U. S. 384, 55 Sup. Ct. 477, 49 L. Ed. 934. And therefore a tax on interstate commerce. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Sault Ste. Marie v. International Transit Co., 234 U. S. 353, 34 Sup. Ct. 826, 58 L. Ed. 1337. The Method of sale employed by appellant is interstate commerce. Commonwealth of Virginia v. Myer, supra. When an extrastate manufacturer, to escape taxation for the right to sell is forced by the state of sale to come into the state [fol. 13] of sale, or bring assets there for taxation, it is interstate commerce and the tax is void. Bethlehem Motors Corp v. Flynt, supra.

The Exemption Granted Other Peddlers as a Comparison

Sec. 192 exempts peddlers of meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other fam-

ily supplies of a perishable nature grown or produced by them, and not purchased for sale. If not grown or produced by them the license tax for peddling is $50.00 for each vehicle used in each county and city. It wholly exempts seafood peddlers as does sec. 192-b, unless they buy the seafood from the persons who take or catch the same, in which instance the fee is $25.00 for each vehicle used in the peddling.

As was noted in Smith v. Cahoon, supra, there is no justification for a distinction between carrying one foodstuff and carrying another. So in the case at bar there is no justification for a distinction between peddling one food and peddling another. What difference could there be in peddling butter, eggs, etc., and peddling bread? The statute emphatically makes one, although it is absolutely obvious that bread is a "family supply of a perishable nature." The Court well knows it is an article of food that rapidly becomes stale, and is sold for immediate consumption. Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459. It is the staff of life.

The comparison, noting particularly that peddlers of seafood are qualifiedly exempt from sec. 192 and absolutely from sec. 192 b, and peddlers of agricultural products such as butter, eggs, milk, etc., are exempt from 192 and 192 b if they grow or produce them and taxed lightly as contrasted with appellant, if they do not, completely annihilates the position that the appellant is not an object of discrimination.

Summary

With the proposition noted that statutes imposing license taxes are construed liberally in favor of the citizen against the government Watts v. Comm., 106 Va. 851, 56 S. E. 223; Brown v. Comm., 98 Va. 336, 36 S. E. 485, it is urged that section 192 b of the Tax Code of Virginia, is invalid because:

(a) It violates the 14th Amendment to the Federal Constitution, in denying equal protection of the laws of Virginia [fols. 14-15] to the appellant, and unlawfully discriminates against it.

(b) It violates Art. 1, Sec. 8, Cl. 3, the commerce clause of the said constitution by imposing a burden on interstate commerce.

PRAYER

Petitioner prays that a writ of error and supersedeas may be granted it, and that the errors of the Corporation Court of the City of Winchester, enumerated in the foregoing assignments of error may be corrected, the judgment be reversed and annulled and the case remanded for such further proceedings as justice may require.

Respectfully submitted, R. Gray Williams, J. Sloan Kuykendall, Martin, Seibert and Beall, Attorneys for Appellant.

* * * * * * *

[fol. 16] IN JUSTICE'S COURT OF CITY OF WINCHESTER

WARRANT

COMMONWEALTH OF VIRGINIA,
City of Winchester, To-Wit:

To the Chief of Police, or any of his assistants, of said city:

Whereas, C. P. McVicar, Comm. of Revenue City of Winchester, of said city, has this day made complaint and information on oath, before me, Donald L. Weems, Police Justice of said City, that Caskey Baking Corporation and Correll Brown, on or about 9th day of September, 1938, in said city, did unlawfully violate section 192-b of the Tax Code of Virginia as amended in Chap. 305 of the 1938 Acts of Legislature, in that they did sell or offer for sale goods, wares and merchandise to one J. E. Keffer without having obtained the license required by the aforesaid section of the Tax Code of Virginia.

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me the body of said Caskey Baking Corp. and Correll Brown to answer said complaint and be dealt with according to law.

Given under my hand this 9th day of September, 1938.

Donald L. Weems, Police Justice.

THE COMMONWEALTH

vs.

CASKEY BAKING CORP. and CORRELL BROWN

Executed this 10th day of September, 1938 by arresting the within named Correll Brown, and bringing him before D. L. Weems, Police Justice.

Edwin Smith, Police Officer.

IN JUSTICE'S COURT OF CITY OF WINCHESTER

JUDGMENT OF COURT—September 10, 1938

Judgment, this 10th day of September, 1938, that within named defendant is guilty upon testimony on oath of J. E. [fol. 17] Keffer and C. P. McVicar, and it is adjudged that he pay a fine of $50.00 and costs of $5.25.

D. L. Weems, Police Justice.

IN JUSTICE'S COURT OF CITY OF WINCHESTER

NOTICE OF APPEAL

My judgment above has been appealed from and it is hereby certified this 10th day of September, 1938, to the Corporation Court of this City for trial.

D. L. Weems, Police Justice.

Counsel for defendant Williams and Kuykendall.

IN CORPORATION COURT, CITY OF WINCHESTER

[Title omitted]

STIPULATION OF FACTS—Filed January 28, 1939

Abram P. Staples, W. W. Martin and James P. Reardon, attorneys representing the Commonwealth of Virginia, and Clarence E. Martin, Clarence E. Martin, Jr., R. Gray Williams and J. Sloan Kuykendall, attorneys representing the Caskey Baking Company, Incorporated, a corporation, do

hereby agree and stipulate the following to be the facts upon which this case shall be heard:

1. On the 9th day of September, 1938, the Caskey Baking Company, Incorporated, a corporation chartered under the laws of the State of West Virginia and domiciled at Martinsburg in said State, and also domesticated to do business in the State of Virginia, as hereinafter more fully appears, was engaged in the business of selling and offering for sale bread and other bakery products in the State of Virginia to grocers and other retail dealers. The bread and other bakery products were sold and delivered at one and the same time by defendant's employees from defendant's motor vehicles, and no previous orders therefor were taken from the customers.

[fol. 18] 2. The Caskey Baking Company, Incorporated, on and before September 9, 1938, was domesticated to do business in the State of Virginia under and pursuant to Section 3847 of the Code of Virginia, which which it had complied, and it had paid the entrance fee for foreign corporations provided in Section 207 of Chapter 15 of the Tax Code and had paid the annual registration fee prescribed by Section 210 of the Tax Code and had fully complied with the statutes of Virginia applicable in the premises.

3. The defendant, on the aforesaid date, was engaged in selling in the manner described in the first numbered paragraph hereof bread and other bakery products in the City of Winchester, Virginia, and was arrested and prosecuted under and by virtue of a warrant issued by Donald L. Weems, Police Justice of the City of Winchester, Virginia. This warrant was issued upon a complaint made by C. P. McVicar, Commissioner of Revenue of the City of Winchester, Virginia, charging defendant with the violation of Section 192-b of the Tax Code of Virginia, as amended by Chapter 305 of the 1938 Acts of the General Assembly, for this, to-wit:

That it has sold, or offered for sale, goods, wares and merchandise to one J. E. Keffer, a licensed retail merchant in Virginia, without having obtained the license required by the aforesaid section of the Tax Code of Virginia.

The defendant was found guilty and fined in the sum of $50 and costs, from which conviction an appeal was taken, on the 10th day of September, 1938, to the Corporation Court of the City of Winchester, Virginia.

4. The goods, wares and merchandise sold and offered for sale by defendant were manufactured by defendant in the City of Martinsburg, West Virginia, and brought to the State of Virginia by motor vehicles and sold and offered for sale in the manner described in the first numbered paragraphs from place to place in Virginia from said motor vehicles. Defendant operated its motor vehicles in Virginia over regular routes and at regular intervals, selling and offering for sale in the manner described in the first numbered paragraph hereof its bread and other bakery products to grocers and other retail dealers in Winchester and other places in Virginia, all of whom were regular customers of the defendant.

5. Said motor vehicles are the property of the defendant corporation, and were operated by employees of the defendant corporation. These employees were paid a fixed salary.

[fol. 19] 6. The drivers of the vehicles, who actually made the sales and delivered the bread and other bakery products, had no interest in the merchandise, nor in the proceeds from such sales.

7. The goods, wares and merchandise, namely, the bread and other bakery products, were not injurious to the health nor damaging to the morals of the citizens of the State of Virginia.

8. The defendant corporation had no place of business in Virginia except it has designated, pursuant to section 3847 of the Code of Virginia, the office of R. Gray Williams in Winchester, Virginia, as its office in this State, at which all claims due residents of Virginia may be audited, settled and paid; had no property permanently located in Virginia; was not a manufacturer taxable on capital by Virginia under section 73 of the Tax Code of Virginia; was not a distributor of manufactured products in Virginia paying a State license Tax on its purchases; was not a wholesale dealer regularly licensed by Virginia. Defendant has paid no taxes of any kind in Virginia, State or local, including license taxes on its motor Vehicles operated in Virginia, except those described in the second numbered paragraph hereof and a State income tax upon that portion of its net profits, if any, allocable to its Virginia business.

9. Defendant has not secured the license prescribed by section 192-b of the Tax Code of Virginia and did on September 9, 1938, sell and deliver in Winchester, Virginia, to one J. E. Keffer, a licensed retail merchant in Virginia, in the manner described in the first numbered paragraph hereof, bread and other bakery products manufactured by defendant in Martinsburg, West Virginia.

10. The highways in Virginia traveled over by defendant's motor vehicles are owned, operated and maintained by and at the expense of the Commonwealth of Virginia, and the State police officers patrolling said highways are provided and compensated by the said Commonwealth.

11. All of the provisions of State statutes and local laws of Virginia and West Virginia relating to the taxation of (a) corporations, and (b) capital of any trade or business, and (c) merchants, both wholesale and retail, and (d) income, and (e) motor vehicles, and (f) property, are being enforced by the State and local tax authorities of Virginia and West Virginia respectively.

12. There are a number of other corporations manufacturing goods, wares and merchandise, in States other than Virginia, including corporations manufacturing bread and other bakery products, selling and offering for sale such [fol. 20] manufactured goods, wares and merchandise in Virginia in the same manner and under substantially the same circumstances and facts as are herein described.

13. This stipulation is agreed to without prejudice to the right of either party to object to the admissibility of any of the stipulated facts on such grounds as to either party may appear proper.

Caskey Bakery Company, Incorporated, by R. Gray Williams, Clarence E. Martin, Clarence E. Martin, Jr., J. Sloan Kuykendall. Commonwealth of Virginia, by Abram P. Staples, W. W. Martin, James P. Reardon.

[File endorsement omitted.]

IN CORPORATION COURT, CITY OF WINCHESTER

[Title omitted]

OPINION—Filed January 27, 1940

The Caskey Baking Company, Incorporated, a West Virginia corporation domesticated in Virginia, was convicted of violating section 192-b of the Tax Code of Virginia for peddling without the license required by that statute. An appeal from the magistrate's judgment of guilty was taken to this court and the case has been submitted upon a stipulation of facts. Under reservation in the stipulation, objection is made to the relevancy of paragraphs 10, 11, and 12. No objection is seen to the first two of these, but the third appears to be irrelevant.

The defense asserted is that the statute, upon which the [fol. 21] conviction rests, is unconstitutional because it contravenes the commerce clause (Article 1, Sec. 8, cl. 3) and the equal protection of the law clause (Fourteenth Amendment) of the United States Constitution.

The defendant admittedly engaged in peddling bakery products in Virginia after transporting them from its bakery in West Virginia.

This statute imposes "an annual State license tax on every person, firm and Corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller." It provides that it shall not apply "to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants." The amount of the tax imposed is $100.00 for each vehicle used in the peddling. It is also provided that this license confers authority to peddle throughout the State as a state license, but that towns and cities may impose license taxes for peddling within their corporate limits. Sec. 192-b The Tax Code of Va. 1938: Acts 1932, p. 376; 1938, page 439.

This and related sections of The Tax Code show that vendors who engage in peddling, such as that covered by this section, are thus classified and taxed:

1. Vendors solely engaged in peddling. These are taxed as provided by this section, and may be also required to pay city and town taxes. (Secs. 192-a and 192-b, Tax Code of Va. 1938.)

2. Manufacturers taxable on capital by the State. These are exempt from license tax, state, city, town and county, for peddling their manufactured goods, but they are taxed on their capital. (Secs. 188, 192-b, 73 Tax Code, Va., 1938.)

3. Distributors of manufactured goods and wholesale dealers licensed by the state. These are exempt from state license tax for such peddling (192-b, Tax Code) but are taxable on their purchases (188 Tax Code) by the state, and are also subject to city and town license taxes. (188, 192-a, Tax Code.)

4. Distributors and vendors of motor vehicle fuels and petroleum products, tobacco, or seafood, a farm, a farmer's co-operative association, a producer of agricultural prod-
[fol. 22] ucts. These are exempt from this State license tax. (192-b, Tax Code.)

The terms of this statute limit it to domestic commerce—peddling in Virginia; they do not invade the sphere of interstate commerce; they do not discriminate as between the origin of the peddler nor as to where the peddled wares originate. The defendant, a West Virginia corporation, is required to pay a tax for peddling and so is a Virginia corporation; the tax applies to all peddlers, regardless of where they or their goods came from.

Emphasis should be focused upon the fact that the defendant seeks to engage in domestic commerce within the state, and that it attacks a tax imposed upon that commerce which the state has the right to regulate and to tax. The defendant, it must be remembered, is not affected by this law in its interstate commerce. This statute does not attempt to impose a tax, for instance, upon deliveries made by defendant in Virginia for merchandise it has sold on orders. The defendant wishes to transport its merchandise into the state and peddle it there; each of its trucks then becoming a travelling store in Virginia. That is the business which this statute taxes.

It has long since been settled that peddling is domestic, not interstate commerce; and that it may be taxed by the state. Howe Machine Co. v. Gage, 100 U. S. 676, 26 L. Ed. 734; Emert. v. Missouri, 156 U. S. 296, L. Ed. 430; Wagner v. Covington, 251, U. S. 95, 64 L. Ed. 734.

In the case last cited above this statement epitomized the decisions on this subject:

"We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation or direct burden upon interstate commerce, although impartially with respect to goods manufactured without as well as within the state, and does not conflict with the commerce clause."

In Emert v. Missouri, supra, in which the opinion by Mr. Justice Gray reviews this subject, this is said of the peddler: "The only business or commerce in which he was engaged was internal and domestic; and, so far as it appears, the only goods in which he was dealing had become [fol. 23] a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state."

It is contended, however, that the exemption in the statute, in favor of manufacturers taxable on capital, has the effect of exempting resident manufacturers and their products from this taxation; and that this is discriminatory as to non-residents and results in a direct burden upon interstate commerce. Cited, is a line of cases holding that state taxation which discriminates against foreign products or persons is violative of the commerce clause. Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Morrill v. Wisconsin 154 U. S. 626, 14 Sup. Ct. 1206, 23 L. Ed. 1009; Minnesota v. Blasuis 290 U. S. 1, 78 L. Ed. 131; Brown v. Maryland, 12 Wheat 419, 6 L. Ed. 678; Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915.

But that line of cases is based upon the holding that the laws in question, either in terms or effect, imposed a direct

burden upon interstate commerce. Certainly, in terms, this statute does not do that; nor, in effect, does it appear to do so. Rather, it seems, this case is to be ruled by the principals of Armour and Co. v. Virginia, 246 U. S. 1, 62 L. Ed. 547, and same case in 118 Va. 242, 87 S. E. 610; Reyman Brewing Co. v. Brister, 179 U. S. 446, 45 L. Ed. 269; New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323.

In Armour and Co. v. Virginia, the statute exempted from a merchants' license tax, manufacturers taxed on capital by the state, who offered for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. Armour and Company, a corporation of New Jersey and qualified to do business in Virginia, had no manufactory in Virginia but did have distributing houses for marketing its merchandise. These were required to pay the merchants' license tax. The constitutionality of the taxing statute was challenged upon the same grounds asserted in the case now before this court. Armour and Company contended that the exemption noted discriminated against the foreign manufacturer because having no place of manufacture within the state, it could not have advantage of the exemption enjoyed by the domestic manufacturer. The Supreme Court of Appeals of Virginia held that here was no such discrimination and that the statute was constitutional. The opinion cited, on this question, the cases last above referred to, and distinguished Commonwealth v. Myer, supra, holding it inapplicable.

[fol. 24] Upon appeal to the Supreme Court of the United States, this decision was sustained, and upon the question of discrimination, the opinion, in part, stated that: "The Error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed, or because of the unlawful discriminations which its provisions express or by operation necessarily bring about, and the indirect and wholly negligible influence on interstate commerce, even if in some respects detrimental, arising from a statute which there was power to enact, and in which there was an absence of all discrimination, whether express or implied, as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the

court below, that principal as applied in adjudged cases is here directly applicable and authoritatively controlling."

The opinion cited New York v. Roberts and Reyman Brewing Co. v. Brester, supra, and then concluded: "In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power, or, if within the power possessed, were intrinsicately repugnant to the commerce clause because of discriminations against interstate commerce which they contained."

In further comment upon the assertion that the statute discriminated against the foreign manufacturer, the opinion stated: "It follows, therefore, that if the asserted disadvantage be real, and not imiginary, it would be one not direct, because not arising from the operation and effect of the statute, but indirect, as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the constitution, which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

The case of New York v. Roberts, supra, involved the asserted unconstitutionality, upon the ground of illegal discrimination between domestic and foreign corporations, of a tax statute of the state of New York which imposed a tax on the amount of capital, employed within the state, by corporations doing business therein, and containing an [fol. 25] exemption from the tax in favor of corporations wholly engaged in manufacturing within the state. The challenge to this statute was made by a corporation of the state of Michigan, which had qualified to do business in New York. It manufactured its products outside of that state and sent them into it for sale in the original packages at its warehouse there.

"It is true," said the court, "Manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are excepted from this tax; but such exemption is not restricted to New York but includes corporations of other states as well, when wholly engaged in manufacturing within the state"—"It is said that the operation of that portion of this taxing law,

which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."

In Reymand Brewing Co. v. Brister, supra, a tax statute of Ohio was contended to be unconstitutional upon the same grounds asserted in the case now before this court, because it discriminated in favor of manufacturers in Ohio as against those with plants located outside that state. There was in the statute an exemption from the tax in favor of the manufacturer who sold at the manufactory, and this was asserted to be discriminatory. New York v. Roberts was cited in holding that this contention was not sound and that the statute was valid.

It has been concluded, therefore, that the exemptions, in the statute here discussed, are not such discrimination as to render the statute violative of the commerce clause. Neither does it seem that denial of the equal protection of the law is to be found in the exemptions provided for by this statute. These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them. Is there not a reasonable basis for placing in separate classes the manufacturer, the distributor and wholesaler, and the itinerant vendor or peddler? Is hostile discrimination apparent because the manufacturer, who is taxable upon his basic capital, is not also taxed by a license tax for sending his products out through the state for sale and delivery? Must he be taxed, also, for this incidental operation, notwith- [fol. 26] standing he is taxed basically in another form, just because a peddler, who is not taxable as a manufacturer, must pay a license tax for peddling? Must a wholesale dealer or distributor, taxable on purchases, be required to pay an additional license tax for selling, and delivering this taxed merchandise, in order to conform with the tax required of the peddler, who is not taxed on his purchases?

It is to be noted that the defendant is neither a manufacturer, a wholesale dealer, nor a distributor, in Virginia; and that it therefore cannot be taxed as such. But there is nothing in the tax laws of Virginia to prevent it from

becoming one of these, in which event it would be entitled to the exemptions applicable because it would be taxed in another form. Defendant is subject to the peddlers, tax, because it apparently prefers to remain outside these classes; remaining outside it would not be taxed at all unless by the license tax imposed.

In the three cases, last above referred to, it was contended, upon reasoning like that here applied by defendant, that the exemptions from taxation were discriminatory and in denial of the equal protection of the law. But the contention was not sustained. The Principles applied in those cases, in reaching that decision, are applicable here, and with the same result.

Inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not limit the power of the state to make any reasonable classification of property, occupations, persons or corporations, for purposes of taxation. It merely forbids inequality caused by clearly arbitrary action, particularly such as is attributable to hostile discrimination against particular persons or classes.

F. S. Royster Guano Co. v. Comm. of Va., 253 U. S. 412, 64 L. Ed. 989; Beers v. Glynn, 211 U. S. 477, 53 L. Ed. 290; Merchants and M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Va. Electric and Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Farmers & Mechanics Ben's. Fire Ins. Ass'n of Roanoke and Botetourt Counties v. Horton, 157 Va. 114, 160 S. E. 315; Leonard v. Maxwell, —, N. C. —, M 3 S. E. 2nd 316. Nor does this clause forbid exemption or classification based upon a principal of equalization of the tax load, whereby a class is exempted from an additional tax because it is taxed in another way. In Re Richmond Linen Supply Co., 291 U. S. 641, 78 L. Ed. 1039; Va. Electric & Power Co. v. Common- [fol. 27] wealth, 169 Va. 688, 194 S. E. 775; Richmond Linen Supply Co. v. Lynchburg, 160 Va. 644, 169 S. E. 554.

The exemptions grouped as class 4 in the summary of this tax classification, stated in the beginning of this discussion, need not be discussed. The defendant is not affected by these exemptions. They are, however, sustainable. Va. Electric & Power Co. v. Commonwealth, supra; Carpel v. Richmond, 162 Va. 833; Leonard v. Maxwell, supra.

In testing this statute the rule is to presume it to be constitutional. The objections asserted against its constitutionality, when measured by this standard, do not appear to be sustainable. For the reasons which have been indicated, it has been concluded that section 192-b of the Tax Code of Virginia is a valid enactment. Since the defendant admits that it has violated that section, it is therefore guilty as charged in the warrant, and it shall be so adjudged.

Philip Williams, Judge.

[File endorsement omitted.]

IN CORPORATION COURT, CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS.

CASKEY BAKING COMPANY, INC.

JUDGMENT—January 27, 1940

This day came the Caskey Baking Company, Incorporated, charged upon a warrant by the Commonwealth of Virginia with a violation of section 192-b of its Tax Code. A Jury was waived and the court having fully heard and considered the facts stipulated by the parties and the arguments of their counsel submitted in written briefs, is of the opinion, for reasons stated in writing and made a part of this judgment by reference, that section 192-b of the Tax [fols. 28-29] Code does not violate Article 1, Section 8, Clause 3 (the commerce clause) nor the Fourteenth Amendment (the equal protection of the law clause) of the Constitution of the United States, and that said section of the Tax Code is a valid enactment.

It is adjudged and ordered that the Caskey Baking Company, Incorporated, is guilty of violating section 192-b of the Tax Code of Virginia, for that the said Company failed to procure the license and pay the tax required and imposed thereby and that it peddled goods, wares and merchandise in the State of Virginia by selling and delivering the same at the same time to a retailer at other than a definite place of business operated by the seller, as charged in the warrant, and that the said Caskey Baking Company,

Incorporated, shall pay a fine of Fifty Dollars ($50.00) and the costs of this prosecution.

The defendant objected and excepted to the entry of this judgment upon the ground that it is contrary to the law and the evidence, and made a motion that the execution be suspended pending the presentation of a petition for a writ of error to the judgment. Thereupon, it is ordered that the execution of this judgment be suspended for a period of sixty days from the date of its entry, so that during such period the defendant may petition for a writ of error to the Supreme Court of Appeals of Virginia, and thereafter such suspension shall continue until such petition is acted on by the Supreme Court of Appeals if such petition is actually filed within the specified time; provided, however, that the defendant or someone for it shall give or file a bond in the Clerk's Office of this court, with surety to be approved by the Clerk thereof, in the penalty of three hundred dollars and conditioned and executed according to the provisions of a section 6338 of the Code of Virginia as amended.

(Signed) Philip Williams, Judge.

Recorded in Law Order Book 13, page 162.

[fol. 30] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 31-32] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 2300

CASKEY BAKING COMPANY, INCORPORATED, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error

Upon a writ of error and supersedeas to a judgment rendered by the Corporation Court of the city of Winchester on the 27th day of January, 1940.

JUDGMENT—September 5, 1940

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of

opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said corporation court.

[fol. 33] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the justices.

[Title omitted]

Opinion by Justice Edward W. Hudgins

From the Corporation Court of the City of Winchester,
Philip Williams, Judge

OPINION—September 5, 1940

Caskey Baking Company, Incorporated, was convicted on the charge of peddling without first having secured a license from the Commonwealth as required by section 192-b of the Tax Code. To that judgment of conviction this writ of error was allowed.

Plaintiff in error is a West Virginia corporation and domesticated in Virginia. It has no place of business in this State except a statutory office in the office of R. Gray Williams, an attorney, at Winchester. It manufactures bakery products (not injurious to health nor damaging to morals) in West Virginia, and sells these products in Virginia to grocers and other retail dealers. The sales are made by employees of the plaintiff in error from a stock of manufactured goods carried by trucks from place to place. These trucks are operated by it over regular routes in Virginia at regular intervals. Sales and deliveries of the bakery products are made at one and the same time and without having secured previous orders from the customers. In other words, plaintiff in error is in Virginia nothing more nor less than an itinerant peddler of merchandise manufactured by it in West Virginia.

The same arguments made in this court were presented to the trial judge, the Honorable Philip Williams, who, after

mature consideration, prepared and filed an opinion that so fully and ably discusses the questions raised that we are content to adopt it as our own. This opinion, in part, is as follows:

"The defense asserted is that the statute, upon which the conviction rests, is unconstitutional because it contravenes the commerce clause (Article 1, Sec. 8, cl. 3) and the equal protection of the law clause (Fourteenth Amendment) of the United States Constitution.

[fol. 34] "The defendant admittedly engaged in peddling bakery products in Virginia after transporting them from its bakery in West Virginia.

"This statute imposes 'an annual State license tax on every person, firm and Corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.' It provides that it shall not apply 'to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.' The amount of the tax imposed is $100.00 for each vehicle used in the peddling. It is also provided that this license confers authority to peddle throughout the State as a state license, but that towns and cities may impose license taxes for peddling within their corporate limits. See 192-b The Tax Code of Va. 1938; Acts 1932, p. 376, 1938, p. 439.

"This and related sections of The Tax Code show that vendors who engage in peddling, such as that covered by this section, are thus classified and taxed:

"1. Vendors solely engaged in peddling. These (with certain exceptions) are taxed as provided by this section, and may be also required to pay city and town taxes. (Secs. 192-a and 192-b, Tax Code of Va. 1938).

"2. Manufacturers taxable on capital by the State. These are exempt from license tax, state, city, town and county, for peddling their manufactured goods, but they are taxed on their capital. (Secs. 188, 192-b, 73 Tax Code, Va., 1938).

"3. Distributors of manufactured goods and wholesale dealers licensed by the state. These are exempt from state license tax for such peddling (192-b, Tax Code) but are [fol. 35] taxable on their purchases (188 Tax Code) by the state, and are also subject to city and town license taxes. (188, 192-a, Tax Code.)

"4. Distributors and vendors of motor vehicle fuels and petroleum products, tobacco, or seafood, a farm, a farmer's cooperative association, a producer of agricultural products. These are exempt from this State license tax. (192-b, Tax Code.)

"The terms of this statute limit it to domestic commerce—peddling in Virginia; they do not invade the sphere of interstate commerce; they do not discriminate as between the origin of the peddler nor as to where the peddled wares originate. The defendant, a West Virginia corporation, is required to pay a tax for peddling and so is a Virginia corporation; the tax applies to all peddlers, regardless of where they or their goods came from.

"Emphasis should be focused upon the fact that the defendant seeks to engage in domestic commerce within the state, and that it attacks a tax imposed upon that commerce which the state has the right to regulate and to tax. The defendant, it must be remembered, is not affected by this law in its interstate commerce. This statute does not attempt to impose a tax, for instance, upon deliveries made by defendant in Virginia for merchandise it has sold on orders. The defendant wishes to transport its merchandise into the state and peddle it there; each of its trucks then becoming a travelling store in Virginia. That is the business which this statute taxes.

"It has long since been settled that peddling is domestic, not interstate commerce; and that it may be taxed by the state. Howe Machine Co. v. Gage, 100 U. S. 676, 26 L. Ed. 734; Emert v. Missouri, 156 U. S. 296, 39 L. Ed. 430; Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157.

"In the case last cited above this statement epitomized the decisions on this subject:

'We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state— [fol. 36] a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states.

It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce clause".'

"In Emert v. Missouri, supra, in which the opinion by Mr. Justice Gray reviews this subject, this is said of the peddler: 'The only business or commerce in which he was engaged was internal and domestic; and, so far as it appears, the only goods in which he was dealing had become a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state.'

"It is contended, however, that the exemption in the statute, in favor of manufacturers taxable on capital, has the effect of exempting resident manufacturers and their products from this taxation; and that this is discriminatory as to non-residents and results in a direct burden upon interstate commerce. Cited, is a line of cases holding that state taxation which discriminates against foreign products or persons is violative of the commerce clause. Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Walton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Morrill v. Wisconsin, 154 U. S. 626, 14 Sup. Ct. 1206, 23 L. Ed. 1009; Minnesota v. Blasuis, 290 U. S. 1, 78 L. Ed. 131; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915.

"But that line of cases is based upon the holding that the laws in question, either in terms or effect, imposed a direct burden upon interstate commerce. Certainly, in terms, this statute does not do that; nor, in effect, does it appear to [fol. 37] do so. Rather, it seems, this case is to be ruled by the principles of Armour and Co. v. Virginia, 246 U. S. 1, 62 L. Ed. 547, and same case in 118 Va. 242, 87 S. E. 610; Reyman Brewing Co. v. Brister, 179 U. S. 446, 45 L. Ed. 269; New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323.

"In Armour and Co. v. Virginia, the statute exempted from a merchants' license tax, manufacturers taxed on capital by the state, who offered for sale at the place of manufacture goods, wares, and merchandise manufactured by them. Armour and Company, a corporation of New Jersey

and qualified to do business in Virginia, had no manufactory in Virginia but did have distributing houses for marketing its merchandise. These were required to pay the merchants' license tax. The constitutionality of the taxing statute was challenged upon the same grounds asserted in the case now before this court. Armour and Company contended that the exemption noted discriminated against the foreign manufacturer because, having no place of manufacture within the state, it could not have advantage of the exemption enjoyed by the domestic manufacturer. The Supreme Court of Appeals of Virginia held that there was no such discrimination and that the statute was constitutional. The opinion cited, on this question, the cases last above referred to, and distinguished Commonwealth v. Myer, supra, holding it inapplicable.

"Upon appeal to the Supreme Court of the United States, this decision was sustained, and upon the question of discrimination, the opinion, in part, stated that: 'The error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed, or because of the unlawful discriminations which its provisions express or by operation necessarily bring about, and the indirect and wholly negligible influence on interstate commerce, even if in some respects detrimental, arising from a statute which there was power to enact, and in which there was an absence of all discrimination, whether express or implied, as the result of the necessary operation and effect of its provisions. The dis- [fol. 38] tinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling.'

"The opinion cited New York v. Roberts and Reyman Brewing Co. v. Brister, supra, and then concluded: 'In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power, or, if within the power possessed, were *intrinsicately* repugnant to the commerce clause because of discriminations against interstate commerce which they contained.'

"In further comment upon the assertion that the statute discriminated against the foreign manufacturer, the opinion stated: 'It follows, therefore, that if the asserted disadvantage be real, and not imaginary, it would be one not direct, because not arising from the operation and effect of the statute, but indirect, as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the constitution, which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government.'

"The case of New York v. Roberts, supra, involved the asserted unconstitutionality, upon the ground of illegal discrimination between domestic and foreign corporations, of a tax statute of the state of *New York* which imposed a tax on the amount of capital, employed within the state, by corporations doing business therein, and containing an exemption from the tax in favor of corporations wholly engaged in manufacturing within the state. The challenge to this statute was made by a corporation of the state of Michigan, which had qualified to do business in New York. It [fol. 39] manufactured its products outside of the state and sent them into it for sale in the original packages at its warehouse there.

" 'It is true,' said the court, 'Manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are excepted from this tax; but such exemption is not restricted to New York but includes corporations of other states as well, when wholly engaged in manufacturing within the state'—'It is said that the operation of that portion of this taxing law, which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.'

"In Reyman Brewing Co. v. Brister, supra, a tax statute of Ohio was contended to be unconstitutional upon the same grounds asserted in the case now before this court, because it discriminated in favor of manufacturers in Ohio as

against those with plants located outside that state. There was in the statute an exemption from the tax in favor of the manufacturer who sold at the manufactory, and this was asserted to be discriminatory. New York v. Roberts was cited in holding that this contention was not sound and that the statute was valid.

"It has been concluded, therefore, that the exemptions, in the statute here discussed, are not such discriminations as to render the statute violative of the commerce clause. Neither does it seem that denial of the equal protection of the law is to be found in the exemptions provided for by this statute. These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them. Is there not a reasonable basis for placing in separate classes the manufacturer, the distributor and wholesaler, and the itinerant [fol. 40] vendor or peddler? Is hostile discrimination apparent because the manufacturer, who is taxable upon his basic capital, is not also taxed by a license tax for sending his products out through the state for sale and delivery? Must he be taxed, also, for this incidental operation, notwithstanding he is taxed basically in another form, just because a peddler, who is not taxable as a manufacturer, must pay a license tax for peddling? Must a wholesale dealer or distributor, taxable on purchases, be required to pay an additional license tax for selling and delivering this taxed merchandise, in order to conform with the tax required of the peddler, who is not taxed on his purchases?

"It is to be noted that the defendant is neither a manufacturer, a wholesale dealer, nor a distributor, in Virginia; and that it therefore cannot be taxed as such. But there is nothing in the tax laws of Virginia to prevent it from becoming one of these, in which event it would be entitled to the exemptions applicable because it would be taxed in another form. Defendant is subject to the peddlers tax, because it apparently prefers to remain outside these classes; remaining outside it would not be taxed at all unless by the license tax imposed.

"In the three cases, last above referred to, it was contended, upon reasoning like that here applied by defendant, that the exemptions from taxation were discriminatory and in denial of the equal protection of the law. But the contention was not sustained. The principles applied in those

cases, in reaching that decision, are applicable here, and with the same result.

"Inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not limit the power of the state to make any reasonable classification of property, occupations, persons or corporations, for purposes of taxation. It merely forbids inequality caused by clearly arbitrary action, particularly such as is attributable to hostile discrimination against particular persons or classes.

[fol. 41] "F. S. Royster Guano Co. v. Comm. of Va., 253 U. S. 412, 64 L. Ed. 989; Beers v. Glynn, 211 U. S. 477, 53 L. Ed. 290; Merchants and M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Va. Electric and Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Farmers & Mechanics Ben's Fire Ins. Assn. of Roanoke and Botetourt Counties v. Horton, 157 Va. 114, 160 S. E. 315; Leonard v. Maxwell, — N. C. —, 3 S. E. (2nd) 316. Nor does this clause forbid exemption or classification based upon a principle of equalization of the tax load, whereby a class is exempted from an additional tax because it is taxed in another way. In Re Richmond Linen Supply Co., 291 U. S. 641, 78 L. Ed. 1039; Va. Electric & Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Richmond Linen Supply Co. v. Lynchburg, 160 Va. 644, 169 S. E. 554.

"The exemptions grouped as class 4 in the summary of this tax classification, stated in the beginning of this discussion, need not be discussed. The defendant is not affected by these exemptions. They are, however, sustainable. Va. Electric & Power Co. v. Commonwealth, supra; Carpel v. Richmond, 162 Va. 833; Leonard v. Maxwell, supra.

"* * * For the reasons which have been indicated, it has been concluded that section 192-b of the Tax Code of Virginia is a valid enactment. Since the defendant admits that it has violated that section, it is therefore guilty as charged in the warrant, and it shall be so adjudged".

Mr. John T. Wingo, an attorney of Richmond, Virginia, by leave of court filed a brief as amicus curiae. The only point advanced in his brief that is not covered by the foregoing opinion is that section 192-b of the Tax Code discriminates against plaintiff in error and others similarly

situated, in that they are subject to a local license tax in each municipality for peddling to retailers while manufacturers and distributors who are otherwise taxed are exempt from the imposition of a local license.

The Attorney General, in dealing with this phase of the case, said: "It will be time enough to pass on the validity of a local license when such a license is challenged. Even if a local license were imposed and held to be invalid, such [fol. 42] a holding would not necessarily have any bearing on the validity of the State license. It will be remembered that one of the reasons for exempting a manufacturer taxable on capital from the State license is that such manufacturer pays other *State* taxes, but this may not be a reason for exemption from *local* licenses.

"Furthermore, section 192-b *does not levy any* local license; it simply says that 'nothing herein contained shall prevent' the localities from imposing licenses. Indeed, it is questionable whether appellant is subject to local licenses. Section 192-a of the Tax Code authorizes the imposition of local licenses on peddling to retailers. The section expressly excepts from the liability, however, 'a producer or manufacturer', whether within or without the State, and does not contain the condition 'taxable on capital by this State'. Appellant is both a producer and manufacturer and comes within the exception".

The judgment of the trial court is Affirmed.

[fol. 43] [File endorsement omitted]

[fol. 44] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION FOR RE-HEARING—Filed October 3, 1940

To the Supreme Court of Appeals of Virginia:

With due deference to this Honorable Court appellants are aggrieved by the judgment herein, assign error to the judgment of the Court, pray that the judgment be set aside and that this Court will rehear and review this case for the reasons hereinafter set forth.

[fols. 45-48] Hereafter in this petition the appellant will be designated for convenience as the "Baking Company" and the Commonwealth of Virginia will be designated as the "Commonwealth".

The errors assigned by the Baking Company in this case were these, to-wit:

1. Section 192b of the Tax Code of Virginia, as amended by the Acts of 1938, Chapter 305, as applied to the Baking Company, is unconstitutional and void, in that

(a) It discriminates against the Baking Company;
(b) It denies to the Baking Company equal protection of the laws of Virginia;
(c) It places an improper burden on interstate commerce.

2. By enacting the statute, having reference to Section 73 of the Tax Code, the General Assembly usurped the powers of the Congress of the United States, under Article 1, Section 8, Clause 3 of the Federal Constitution, in that Congress alone has the power to regulate commerce between the States.

[fol. 49] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

MINUTE ENTRY OF FILING PETITION FOR REHEARING—October 3, 1940

The petition of plaintiff in error in this cause for a rehearing of the judgment rendered by this court on the 5th day of September, 1940, was this day received and the filing thereof is here noted of record.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—October 16, 1940

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 5th day of September, 1940, and grant a rehearing thereof, the prayer of the said petition is denied.

[fol. 50] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed December 4, 1940

To the Chief Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Caskey Baking Company, Inc., a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

On the 10th day of September, 1938, your petitioner was arrested by virtue of a warrant issued by Donald L. Weems, Police Justice of the City of Winchester, Commonwealth of Virginia, charging your petitioner with violating sec. 192 b of the Tax Code of the Commonwealth of Virginia, as amended by the Acts of 1928, in that your petitioner did offer its goods and merchandise for sale to a licensed retail dealer, in said City, without having obtained the license required said *said* sec. 192 b of the Tax Code of Virginia.

Upon conviction and the imposition of a fine by the aforesaid Police Justice, your petitioner appealed to the Corporation Court of the City of Winchester, Virginia.

[fol. 51] It was contended by your petitioner that said sec. 192 b of the Tax Code of Virginia, was void as being repugnant to the Constitution of the United States. The Corporation Court found that the statute was not repugnant to the Constitution of the United States, and on the 27th day of January, 1940, entered an order upholding the validity thereof, and adjudging your petitioner guilty as charged in the warrant.

A writ of error was presented to the Supreme Court of Appeals of Virginia, where the validity of the said sec. 192 b of the Tax Code of Virginia, as amended, was again upheld as not being repugnant to the Constitution of the United States. The judgment of the Corporation Court was unanimously affirmed by an order made and entered on the 5th day of September, 1940. On the 16th day of October, 1940, the Supreme Court of Appeals of Virginia refused a petition for rehearing filed by your petitioner.

That the Supreme Court of Appeals of Virginia is the highest Court of said State in which a decision in this suit can be had.

That in said action there is drawn in question the validity of a statute of the Commonwealth of Virginia, on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates art. 1, sec. 8, cl. 3, of the Constitution, and the Fourteenth Amendment of the Constitution of the United States.

[fol. 52] That, therefore, in accordance with sec. 237 (a) of the Judicial Code, as amended, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31st, 1928, was passed, to-wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the said Supreme Court of Appeals of Virginia, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of Appeals of Virginia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law; that an order be made touching the security to be required of the petitioner; that the bond or supersedeas tendered by the petitioner be approved, and that the [fol. 53] said appeal may operate as a supersedeas.

R. Gray Williams, Winchester, Va., Clarence E. Martin, Martinsburg, W. Va., Martin, Seibert and Beall, Martinsburg, W. Va., Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

Service of the above petition accepted on behalf of Commonwealth of Virginia this 4th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 54] In Supreme Court of the United States

[Title omitted]

Assignments of Error—Filed December 4, 1940

The petitioner assigns the following errors in the record and proceedings in this cause:

1. That the Supreme Court of Appeals of Virginia erred in refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

2. That the Supreme Court of Appeals of Virginia erred in holding that Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, is not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in holding that the statute, Section 192 b, as amended by the Acts of 1938, Chapter 305 of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

4. That the Supreme Court of Appeals of Virginia erred in holding that said Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not abridge the rights of the petitioner, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States in that said Court refused to accept the petitioners contention that said statute,

(a) Discriminates in favor of resident manufacturers against non-resident manufacturers.

[fol. 55] (b) Denies to the petitioner the equal protection of the laws of Virginia.

(c) Discriminates in favor of resident peddlers against non-resident peddlers.

Prayer for Reversal

For which errors, Caskey Baking Company, Inc., appellant, prays that the judgment of the Supreme Court of

Appeals of Virginia, dated September 5, 1940, upon which rehearing was denied on October 16th, 1940, in the above entitled action be reversed and dismissed, and a judgment rendered in favor of appellant for costs.

R. Gray Williams, Martin, Seibert and Beall, Clarence E. Martin, Attorneys for Appellant.

[File endorsement omitted.]

Service of the above assignment of errors accepted this 4th day of December, 1940, for Commonwealth of Virginia.

Abram P. Staples, Attorney General of Virginia.

[fol. 56] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—December 4, 1940

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Appeals of the State of Virginia on the 5th day of September, 1940, in which a petition for rehearing was refused on the 16th day of October, 1940, and from each and every part thereof, now having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Appeals of Virginia, in the above entitled action; and

It is further ordered that the Clerk of the Supreme Court of Appeals of Virginia, within forty days from this date, shall prepare and certify a transcript of material parts of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States under his hand and the seal of said Court, which parts of the record shall be designated by proecipe or stipulations of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fols. 57-58] It is further ordered that the appellant shall give a good and sufficient bond for costs and supersedeas in the sum of $500.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and all proceedings in this action until the final disposal of this cause by the Supreme Court of the United States.

Henry W. Holt, Acting Chief Justice of the Supreme Court of Appeals of Virginia.

December 4th 1940.

O. K.: A. P. S.

Service of the above order accepted for the Commonwealth of Virginia this 4th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 59] Cost Bond on appeal for $500.00 approved and filed Dec. 4, 1940, omitted in printing.

[fol. 60] Citation in usual form showing service on Abram P. Staples omitted in printing.

[fol. 61] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

APPELLANT'S PRAECIPE FOR RECORD ON APPEAL

To the Clerk of the Supreme Court of Appeals of Virginia.

SIR:

You will please prepare transcript of the record to be transmitted to the Supreme Court of the United States in pursuance to the appeal heretofore taken in this case, and include therein the following:

1. Petition for writ of error to the Supreme Court of Appeals of Virginia by Caskey Baking Company, Inc., a corporation, beginning on page 1 of your printed record No. 2300, to and including page 3 thereof.

2. All of the remainder of the record beginning on page 16 thereof to and including page 28 thereof.

3. Opinion of the Supreme Court of Appeals of Virginia, dated September 5th, 1940, together with order of that date.

4. The part of the petition for rehearing filed on the — day of September, 1940, showing errors assigned on page 2 of the printed petition.

[fol. 62] 5. Order of Court of October 16th, 1940, refusing to rehear.

6. Petition for Appeal to the Supreme Court of the United States, with admission of service thereon.

7. Assignment of Errors and Prayer for Reversal, with admission of service thereon.

8. Order allowing appeal to the Supreme Court of the United States, with admission of service thereon.

9. Citation on appeal to Appellee, with admission of service thereon.

10. Jurisdictional statement with admission of service thereon.

11. Statement to Appellee directing its attention to the provisions of paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, with admission of service thereon.

12. This praecipe, with admission of service thereon, and Clerk's certificate to transcript.

R. Gray Williams, J. Sloan Kuykendall, Winchester, Virginia. Martin, Seibert & Beall, Martinsburg, West Va., Counsel for Appellant. R. Gray Williams, Clarence E. Martin, of Counsel.

Service of the above praecipe is hereby accepted for and on behalf of the Commonwealth of Virginia, this 7th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 63] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

APPELLEE'S PRAECIPE FOR RECORD ON APPEAL

To the Clerk of the Supreme Court of Appeals of Virginia.

SIR:

In addition to the contents of the record in the above matter designated in praecipe of appellant you will please include the following:

1. The remaining portion of the petition for writ of error in this case filed with the Supreme Court of Appeals of Virginia beginning on page 4 of printed record No. 2300 and ending at the middle of page 14 of said record.

2. This praecipe.

Abram P. Staples, Attorney General of Virginia, Counsel for Appellee.

Service accepted of the above praecipe this 10th day of December, 1940.

R. Gray Williams, Clarence E. Martin, Attorneys for Appellant.

December 10, 1940.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed February 13, 1941

To the Honorable Justices of the Supreme Court of the United States:

Comes the petitioner and appellant in the above named action and respectfully says that the following is a statement of the points upon which it intends to rely before this honorable Court:

1. That the Supreme Court of Appeals of Virginia erred in refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

[fol. 66] 2. That the Supreme Court of Appeals of Virginia erred in holding that Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, is not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in holding that the statute, Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

4. That the Supreme Court of Appeals of Virginia erred in holding that said Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not abridge the rights of the appellant, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States in that said Court refused to accept the appellant's contention that said statute,

(a) Discriminates in favor of resident manufacturers against non-resident manufacturers.

(b) Denies to the appellant the equal protection of the laws of Virginia.

(c) Discriminates in favor of resident peddlers against non-resident peddlers.

Appellant further states, in conformity with the statement filed with the Clerk of the Supreme Court of Appeals of Virginia, by appellee, that it desires all of the record as certified by the Clerk of the Supreme Court of Appeals of Virginia, to be printed as the record in this case.

[fol. 67] Wherefore, petitioner prays accordingly.

Caskey Baking Company, Inc., a Corporation, by Counsel. R. Gray Williams, Winchester, Va., Clarence E. Martin, Martinsburg, W. Va., Attorneys for Appellant.

Service of the above accepted.

Abram P. Staples, Attorney General of the Commonwealth of Virginia.

Endorsed on Cover: File No. 45,025. Virginia, Supreme Court of Appeals, Term No. 676. Caskey Baking Company, Inc., Appellant, vs. Commonwealth of Virginia. Filed January 6, 1941. Term No. 676 O. T. 1940.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, Inc.

Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

R. Gray Williams,
J. Sloan Kuykendall,
Counsel for Appellant.

R. G. Williams,
Clarence E. Martin,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INC., A CORPORATION,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

The appellant in support of the jurisdiction of this Court to renew the above-entitled action on appeal, respectfully represents:

Basis Upon Which It Is Contended the Supreme Court of the United States Has Jurisdiction.

I.

The statute under which this Court has jurisdiction to allow this appeal is Section 237, Judicial Code, as amended (28 U. S. C., sec. 344 (a)):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision

is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal".

II.

The statute, the validity of which is involved in Section 192b of the Tax Code of Virginia, as amended by the Acts of 1928, chapter 305, of the General Assembly. (This act is found in Michie's Cumulative Supplement of 1940 to the Virginia Code of 1936, Annotated.) The statute follows:

> "There is hereby imposed an annual State license tax on every person, firm and corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a farmer, a farmer's cooperative association, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.
>
> Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.
>
> The annual State license tax hereby imposed, as aforesaid, on every such person, firm or corporation, peddling, as aforesaid, is in the sum of one hundred dollars, for each vehicle used in such business, and the said license shall not be issued quarterly, nor shall it be transferable, nor shall the tax be subject to proration. The license aforesaid shall be good throughout the State as a State license, but nothing herein contained shall prevent cities and towns from imposing city or town license taxes on such persons, firms, or

corporations doing such business within the corporate limits of the cities and towns, respectively.

Every vehicle used by any licensee hereunder shall have conspicuously displayed thereon the name of the person, firm or corporation using the same, with the post office address of the licensee, and the license hereby required shall be conspicuously displayed on each vehicle while used in such business.

Every person, firm or corporation claiming to be a distributor and/or vendor of motor vehicle fuels and petroleum products, a farmer, a dealer in forest products or tobacco, or seafood, a producer of agricultural products, a wholesale dealer, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases and selling and delivering at the same time, or offering to sell and deliver at the same time, to licensed dealers or retailers, such goods, wares or merchandise, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claim other than his or its mere statement, that he or it is exempt from the provisions of this act, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence. The exemption hereby accorded a distributor and/or vendor of motor vehicle fuels and petroleum products and a dealer in forest products or tobacco, is restricted to such peddling of motor vehicle fuels and petroleum products and forest products, and tobacco; and in the case of a farmer, a producer of agricultural products, or a manufacturer taxable on capital by this State, the exemption is restricted to such peddling of goods, wares or merchandise actually manufactured, produced or grown by the seller.

A peddler, within the meaning of this act, is any person, firm, or corporation who or which, at other than a definite place of business operated by the seller, shall sell, or offer to sell, goods, wares or merchandise to

licensed dealers or retailers, and at the time of such sale or exposure for sale, shall deliver, or offer to deliver, the goods, wares, or merchandise to the buyer, and any delivery made on the day of sale shall be construed as equivalent to delivery at the time of sale.

Every person, firm or corporation claiming exemption from the provisions of this act on the ground that he or it is delivering goods, wares or merchandise previously sold to the customer, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claims other than his or its mere statement, which evidence may be an invoice or signed order describing the goods, wares or merchandise involved, and the amount and price thereof, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence.

Every person, firm or corporation violating any provision of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred and fifty dollars for each offense, and each day's violation of any provision of this act shall be deemed a separate offense."

The statute, just quoted, using the words "a manufacturer taxable on capital in this State", Section 73 of the Tax Code of Virginia defines "capital" (Michie's Virginia Code of 1936, Annotated, Appendix, Tax Code, sec. 73, page 2416), as follows:

"Capital as used herein is defined as follows:

First: The inventory of stock on hand, which shall include all materials for use in the business, whether at the place of business, in storage or elsewhere in the State.

Second: The excess of all bills and accounts receivable over bills and accounts payable.

Third: All money on hand and on deposit.

Fourth: All other taxable personal property of any kind whatever, including all choses in action, equities, demands and claims, but excluding the property hereinafter specifically mentioned in this section."

Nature of the Case.

III.

On the 9th of September, 1938, the Caskey Baking Company, Inc., a West Virginia corporation and domesticated in Virginia, engaged in the manufacture of bread in Martinsburg, West Virginia, was arrested in Winchester, Virginia, charged with violating section 192 b of the Tax Code of Virginia, in that it sold or offered for sale its products without paying the license fee required by this section.

Upon conviction in the police court, petitioner appealed to the Corporation Court of the City of Winchester. There the case was submitted to the Court upon an agreed statement of facts. It was agreed that bread was manufactured in West Virginia and brought to Virginia by motor vehicles and sold to a licensed retail merchant and to other licensed merchants going from place to place over regular routes at regular intervals, these merchants being regular customers of the petitioner. No previous order had been taken for the bread delivered, however, the order being taken and the bread delivered at the same time.

It was further agreed that the petitioner paid a State income tax and its corporation tax, and had an office in Winchester, Virginia, as required by the foreign corporations, which are domesticated in Virginia, but that the petitioner did not come within the exceptions of the statute in that (a) it had no property permanently located in Virginia, (b) was not a manufacturer taxable on capital by Virginia under section 73 of the Tax Code (quoted above),

and was not a wholesale dealer regularly licensed in Virginia.

The constitutional questions were promptly and properly raised. The Corporation Court decided against petitioner in a written opinion on these questions. Judgment was in favor of Commonwealth, and in its order the Court made his opinion part of the record and specifically stated that the application of Section 192 b of the Tax Code of Virginia did not "violate Article 1, section 8, clause 3, (the commerce clause) nor the Fourteenth Amendment (the equal protection of law clause) of the Constitution of the United States, and that said section of the Tax Code is a valid enactment".

A writ of error was granted by the Supreme Court of Appeals of Virginia upon assignment of errors that set out that the statute (a) discriminated against petitioner, (b) denied it the equal protection of the laws of Virginia, (c) placed an improper burden on interstate commerce, and (d) by enacting the statute, the General Assembly of Virginia had usurped the powers of the Congress under Article 1, section 8, clause 3, of the Constitution. After the Court, practically adopting the opinion of the Corporation Court, decided against your petitioner on September 5th, 1940, a petition for rehearing was filed in which the same constitutional matters were relied upon, and refused on October 16th, 1940. All proceedings were properly taken within the proper time. A copy of the opinion of the Supreme Court of Appeals of Virginia is attached hereto as "Exhibit A" hereof.

As the Virginia Court has upheld the validity of the statute involved, despite the contention of appellant that such construction violates the provisions of the Federal Constitution, petitioner is entitled to this appeal.

Constitutional Questions Involved.

IV.

The agreed statement of facts filed in the Corporation Court of the City of Winchester, heretofore referred to, states that there are a number of other corporations manufacturing goods, wares and merchandise in States other than Virginia, including corporations manufacturing bread and other bakery products, which are selling and offering for sale these goods in Virginia in the same manner and under substantially the same circumstances and facts as in this case. Therefore this case is one of material importance to all of these persons.

As stated, as soon as the questions pertaining to the constitutionality of the statute under which the Commonwealth of Virginia was proceeding could be raised, they were called to the attention of the trial court, and, later, to the appellate court, in the proper manner. The Corporation Court of the City of Winchester passed upon the constitutional questions involved and ruled against the petitioner. This opinion was adopted by the Supreme Court of Appeals of Virginia, as shown by its opinion. The order entered by the trial court finding against the petitioner and adjudging it guilty of violation of the statute involved and which order was sustained by the appellate court, found affirmatively "that Section 192 b of the Tax Code does not violate Article 1, Section 8, Clause 3 (the commerce clause) nor the Fourteenth Amendment (the equal protection of the law clause) of the Constitution of the United States, and that said section of the Tax Code is a valid enactment."

The constitutional questions involved here are:

1. Is Section 192-b of the Tax Code of Virginia, as amended by Acts of 1938, chapter 305, as applied to your petitioner, unconstitutional and void, because—

(a) It discriminates against your petitioner?

(b) It denies your petitioner equal protection of the laws of Virginia?

(c) It places an improper burden on interstate commerce?

2. Did the General Assembly, by enacting Section 192-b of the Tax Code, having reference to Section 73 of the Tax Code, usurp the powers of Congress under Article 1, Section 8, Clause 3, of the Constitution, which provides that Congress shall have the power to regulate commerce between the States?

This petitioner contends that, as applied to the petitioner, the statute is unconstitutional and void. The Commonwealth claims that it is not.

Summary.

V.

Neither the Corporation Court nor the Supreme Court of Appeals commented upon nor mentioned *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029, although called to the attention of both courts as being controlling.

It is submitted that the petitioner, when domesticated, is put on the same level as domestic corporations of the same kind, stands equal with them, and any tax must conform to the equal protection clause of the Fourteenth Amendment. *Hanover Fire Ins. Co.* v. *Carr*, 272 U. S. 494, 71 L. Ed. 372.

Clearly this statute is in violation of the interstate commerce clause, because it is a discrimination against the goods of another State. *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 30 L. Ed. 694.

The following cases are submitted to sustain the jurisdiction of this Court:

Wagner v. *Covington*, 251 U. S. 95, 95 Sup. Ct. 104, 64 L. Ed. 157;

Howe Machine Co. v. *Gage*, 100 U. S. 676, 25 L. Ed. 754;

Emert v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430;

Robbins v. *Shelby Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694;

Brennan v. *Tutusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719;

Hanover Fire Ins. Co. v. *Carr*, 272 U. S. 494, 57 Sup. Ct. 179, 71 L. Ed. 372;

Bethlehem Motors Corporation v. *Flynt*, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. Ed. 1029;

Colgate v. *Harvey*, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299;

Smith v. *Cahoon*, 203 U. S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264.

Wherefore, petitioner submits that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in this action.

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J. Sloan Kuykendall,
Martin, Seibert & Beall,
Attorneys for Appellant.

R. Gray Williams,
Winchester, Va.;
Clarence E. Martin,
Martinsburg, W. Va.,
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EXHIBIT "A".

Present: All the justices.

Record No. 2300.

CASKEY BAKING COMPANY, INC.,

v.

COMMONWEALTH OF VIRGINIA.

From the Corporation Court of the City of Winchester,
Philip Williams, Judge.

OPINION BY JUSTICE EDWARD W. HUDGINS.

Staunton, Va., Sept. 5, 1940.

Caskey Baking Company, Incorporated, was convicted on the charge of peddling without first having secured a license from the Commonwealth as required by section 192-b of the Tax Code. To that judgment of conviction this writ of error was allowed.

Plaintiff in error is a West Virginia corporation and domesticated in Virginia. It has no place of business in this State except a statutory office in the office of R. Gray Williams, an attorney, at Winchester. It manufactures bakery products (not injurious to health nor damaging to morals) in West Virginia, and sells these products in Virginia to grocers and other retail dealers. The sales are made by employees of the plaintiff in error from a stock of manufactured goods carried by trucks from place to place. These trucks are operated by it over regular routes in Virginia at regular intervals. Sales and deliveries of the bakery products are made at one and the same time and without having secured previous orders from the customers. In other words, plaintiff in error is in Virginia nothing more nor less than an itinerant peddler of merchandise manufactured by it in West Virginia.

The same arguments made in this court were presented to the trial judge, the Honorable Philip Williams, who, after mature consideration, prepared and filed an opinion

that so fully and ably discusses the questions raised that we are content to adopt it as our own. This opinion, in part, is as follows:

"The defense asserted is that the statute, upon which the conviction rests, is unconstitutional because it contravenes the commerce clause (Article 1, Sec. 8, cl. 3) and the equal protection of the law clause (Fourteenth Amendment) of the United States Constitution.

"The defendant admittedly engaged in peddling bakery products in Virginia after transporting them from its bakery in West Virginia.

"This statute imposes 'an annual State license tax on every person, firm and Corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.' It provides that it shall not apply 'to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.' The amount of the tax imposed is $100.00 for each vehicle used in the peddling. It is also provided that this license confers authority to peddle throughout the State as a state license, but that towns and cities may impose license taxes for peddling within their corporate limits. See 192-b The Tax Code of Va. 1938; Acts 1932, p. 376, 1938, p. 439.

"This and related sections of The Tax Code show that vendors who engage in peddling, such as that covered by this section, are thus classified and taxed:

"1. Vendors solely engaged in peddling. These (with certain exceptions) are taxed as provided by this section, and may be also required to pay city and town taxes. (Secs. 192-a and 192-b, Tax Code of Va. 1938).

"2. Manufacturers taxable on capital by the State. These are exempt from license tax, state, city, town and

county, for peddling their manufactured goods, but they are taxed on their capital (Secs. 188, 192-b, 73 Tax Code, Va., 1938).

"3. Distributors of manufactured goods and wholesale dealers licensed by the state. These are exempt from state license tax for such peddling (192-b, Tax Code) but are taxable on their purchases (188 Tax Code) by the state, and are also subject to city and town license taxes (188, 192-a, Tax Code).

"4. Distributors and vendors of motor vehicle fuels and petroleum products, tobacco, or seafood, a farm, a farmer's cooperative association, a producer of agricultural products. These are exempt from this State license tax (192-b, Tax Code).

"The terms of this statute limit it to domestic commerce—peddling in Virginia; they do not invade the sphere of interstate commerce; they do not discriminate as between the origin of the peddler nor as to where the peddled wares originate. The defendant, a West Virginia corporation, is required to pay a tax for peddling and so is a Virginia corporation; the tax applies to all peddlers, regardless of where they or their goods came from.

"Emphasis should be focused upon the fact that the defendant seeks to engage in domestic commerce within the state, and that it attacks a tax imposed upon that commerce which the state has the right to regulate and to tax. The defendant, it must be remembered, is not affected by this law in its interstate commerce. This statute does not attempt to impose a tax, for instance, upon deliveries made by defendant in Virginia for merchandise it has sold on orders. The defendant wishes to transport its merchandise into the state and peddle it there; each of its trucks then becoming a travelling store in Virginia. That is the business which this statute taxes.

"It has long since been settled that peddling is domestic, not interstate commerce; and that it may be taxed by the state. *Howe Machine Co.* v. *Gage*, 100 U. S. 676, 26 L. Ed. 734; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430; *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157.

"In the case last cited above this statement epitomized the decisions on this subject:

'We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state—a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce clause".'

"In *Emert* v. *Missouri, supra,* in which the opinion by Mr. Justice Gray reviews this subject, this is said of the peddler: 'The only business or commerce in which he was engaged was internal and domestic; and, so far as it appears, the only goods in which he was dealing had become a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state.'

"It is contended, however, that the exemption in the statute, in favor of manufacturers taxable on capital, has the effect of exempting resident manufacturers and their products from this taxation; and that this is discriminatory as to non-residents and results in a direct burden upon interstate commerce. Cited, is a line of cases holding that state taxation which discriminates against foreign products or persons is violative of the commerce clause. *Webber* v. *Virginia,* 103 U. S. 344, 26 L. Ed. 565; *Welton* v. *Missouri,* 91 U. S. 275, 23 L. Ed. 347; *Morrill* v. *Wisconsin,* 154 U. S. 626, 14 Sup. Ct. 1206, 23 L. Ed. 1009; *Minnesota* v. *Blasuis,* 290 U. S. 1, 78 L. Ed. 131; *Brown* v. *Maryland,* 12 Wheat. 419, 6 L. Ed. 678; *Commonwealth* v. *Myer,* 92 Va. 809, 23 S. E. 915.

"But that line of cases is based upon the holding that the laws in question, either in terms or effect, imposed a direct burden upon interstate commerce. Certainly, in terms, this statute does not do that; nor, in effect, does it appear to do so. Rather, it seems, this case is to be ruled

by the principles of *Armour and Co.* v. *Virginia,* 246 U. S. 1, 62 L. Ed. 547, and same case in 118 Va. 242, 87 S. E. 610; *Reyman Brewing Co.* v. *Brister,* 179 U. S. 446, 45 L. Ed. 269; *New York* v. *Roberts,* 171 U. S. 658, 43 L. Ed. 323.

"In *Armour and Co.* v. *Virginia,* the statute exempted from a merchants' license tax, manufacturers taxed on capital by the state, who offered for sale at the place of manufacture goods, wares, and merchandise manufactured by them. Armour and Company, a corporation of New Jersey and qualified to do business in Virginia, had no manufactory in Virginia but did have distributing houses for marketing its merchandise. These were required to pay the merchants' license tax. The constitutionality of the taxing statute was challenged upon the same grounds asserted in the case now before this court. Armour and Company contended that the exemption noted discriminated against the foreign manufacturer because, having no place of manufacture within the state, it could not have advantage of the exemption enjoyed by the domestic manufacturer. The Supreme Court of Appeals of Virginia held that there was no such discrimination and that the statute was constitutional. The opinion cited, on this question, the cases last above referred to, and distinguished *Commonwealth* v. *Myer, supra,* holding it inapplicable.

"Upon appeal to the Supreme Court of the United States, this decision was sustained, and upon the question of discrimination, the opinion, in part, stated that: 'The error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed, or because of the unlawful discriminations which its provisions express or by operation necessarily bring about, and the indirect and wholly negligible influence on interstate commerce, even if in some respects detrimental, arising from a statute which there was power to enact, and in which there was an absence of all discrimination, whether express or implied, as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system.

Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling.'

"The opinion cited *New York* v. *Roberts* and *Reyman Brewing Co.* v. *Brister, supra,* and then concluded: 'In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power, or, if within the power possessed, were *intrinsicately* repugnant to the commerce clause because of discriminations against interstate commerce which they contained.'.

"In further comment upon the assertion that the statute discriminated against the foreign manufacturer, the opinion stated: 'It follows, therefore, that if the asserted disadvantage be real, and not imaginary, it would be one not direct, because not arising from the operation and effect of the statute, but indirect, as a mere consequence of the situation of the persons and property affected and of the non-discriminating exercise by the state of power which it had a right to exert without violating the constitution, which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government.'

"The case of *New York* v. *Roberts, supra,* involved the asserted unconstitutionality, upon the ground of illegal discrimination between domestic and foreign corporations, of a tax statute of the state of *New York* which imposed a tax on the amount of capital, employed within the state, by corporations doing business therein, and containing an exemption from the tax in favor of corporations wholly engaged in manufacturing within the state. The challenge to this statute was made by a corporation of the state of Michigan, which had qualified to do business in New York. It manufactured its products outside of the state and sent them into it for sale in the original packages at its warehouse there.

" 'It is true,' said the court, 'Manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are excepted from

this tax; but such exemption is not restricted to New York but includes corporations of other states as well, when wholly engaged in manufacturing within the state'—'It is said that the operation of that portion of this taxing law, which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.'

"In *Reyman Brewing Co.* v. *Brister, supra,* a tax statute of Ohio was contended to be unconstitutional upon the same grounds asserted in the case now before this court, because it discriminated in favor of manufacturers in Ohio as against those with plants located outside that state. There was in the statute an exemption from the tax in favor of the manufacturer who sold at the manufactory, and this was asserted to be discriminatory. *New York* v. *Roberts* was cited in holding that this contention was not sound and that the statute was valid.

"It has been concluded, therefore, that the exemptions, in the statute here discussed, are not such discriminations as to render the statute violative of the commerce clause. Neither does it seem that denial of the equal protection of the law is to be found in the exemptions provided for by this statute. These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them. Is there not a reasonable basis for placing in separate classes the manufacturer, the distributor and wholesaler, and the itinerant vendor or peddler? Is hostile discrimination apparent because the manufacturer, who is taxable upon his basic capital, is not also taxed by a license tax for sending his products out through the state for sale and delivery? Must he be taxed, also, for this incidental operation, notwithstanding he is taxed basically in another form, just because a peddler, who is not taxable as a manufacturer, must pay a license tax for peddling? Must a wholesale dealer or distributor, taxable

on purchases, be required to pay an additional license tax for selling and delivering this taxed merchandise, in order to conform with the tax required of the peddler, who is not taxed on his purchases?

"It is to be noted that the defendant is neither a manufacturer, a wholesale dealer, nor a distributor, in Virginia; and that it therefore cannot be taxed as such. But there is nothing in the tax laws of Virginia to prevent it from becoming one of these, in which event it would be entitled to the exemptions applicable because it would be taxed in another form. Defendant is subject to the peddlers tax, because it apparently prefers to remain outside these classes; remaining outside it would not be taxed at all unless by the license tax imposed.

"In the three cases, last above referred to, it was contended, upon reasoning like that here applied by defendant, that the exemptions from taxation were discriminatory and in denial of the equal protection of the law. But the contention was not sustained. The principles applied in those cases, in reaching that decision, are applicable here, and with the same result.

"Inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not limit the power of the state to make any reasonable classification of property, occupations, persons or corporations, for purposes of taxation. It merely forbids inequality caused by clearly arbitrary action, particularly such as is attributable to hostile discrimination against particular persons or classes.

"*F. S. Royster Guano Co.* v. *Comm. of Va.*, 253 U. S. 412, 64 L. Ed. 989; *Beers* v. *Glynn*, 211 U. S. 477, 53 L. Ed. 290; *Merchants and M. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Va. Electric and Power Co.* v. *Commonwealth*, 169 Va. 688, 194 S. E. 775; *Farmers & Mechanics Ben's Fire Ins. Assn. of Roanoke and Botetourt Counties* v. *Horton*, 157 Va. 114, 160 S. E. 315; *Leonard* v. *Maxwell*, — N. C. —, 3 S. E. (2nd) 316. Nor does this clause forbid exemption or classification based upon a principle of equalization of the tax load, whereby a class

is exempted from an additional tax because it is taxed in another way. In Re *Richmond Linen Supply Co.*, 291 U. S. 641, 78 L. Ed. 1039; *Va. Electric & Power Co.* v. *Commonwealth*, 169 Va. 688, 194 S. E. 775; *Richmond Linen Supply Co.* v. *Lynchburg*, 160 Va. 644, 169 S. E. 554.

"The exemptions grouped as class 4 in the summary of this tax classification, stated in the beginning of this discussion, need not be discussed. The defendant is not affected by these exemptions. They are, however, sustainable. *Va. Electric & Power Co.* v. *Commonwealth, supra; Carpel* v. *Richmond*, 162 Va. 333; *Leonard* v. *Maxwell, supra.*

"" * * For the reasons which have been indicated, it has been concluded that section 192-b of the Tax Code of Virginia is a valid enactment. Since the defendant admits that it has violated that section, it is therefore guilty as charged in the warrant, and it shall be so adjudged".

Mr. John T. Wingo, an attorney of Richmond, Virginia, by leave of court filed a brief as *amicus curiae*. The only point advanced in his brief that is not covered by the foregoing opinion is that section 192-b of the Tax Code discriminates against plaintiff in error and others similarly situated, in that they are subject to a local license tax in each municipality for peddling to retailers while manufacturers and distributors who are otherwise taxed are exempt from the imposition of a local license.

The Attorney General, in dealing with this phase of the case, said: "It will be time enough to pass on the validity of a local license when such a license is challenged. Even if a local license were imposed and held to be invalid, such a holding would not necessarily have any bearing on the validity of the State license. It will be remembered that one of the reasons for exempting a manufacturer taxable on capital from the State license is that such manufacturer pays other *State* taxes, but this may not be a reason for exemption from *local* licenses.

"Furthermore, section 192-b *does not levy any* local license; it simply says that 'nothing herein contained shall prevent' the localities from imposing licenses. Indeed, it

is questionable whether appellant is subject to local licenses. Section 192-a of the Tax Code authorizes the imposition of local licenses on peddling to retailers. The section expressly excepts from the liability, however, 'a producer or manufacturer', whether within or without the State, and does not contain the condition 'taxable on capital by this State'. Appellant is both a producer and manufacturer and comes within the exception".

The judgment of the trial court is
Affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

BRIEF ON BEHALF OF APPELLANT.

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J. SLOAN KUYKENDALL,
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Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

BRIEF ON BEHALF OF APPELLANT.

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

All numbers in parentheses, preceded by the letter "R" refer to pages of the Record, unless otherwise noted. Sections 73, 192 and 192 b of the Tax Code of Virginia, are referred to as Section 72, Section 192 and Section 192 b, respectively. They are set out *in extenso* herein as Appendix A, B and C, respectively.

STATEMENT OF THE CASE.

This case comes here on appeal from the Supreme Court of Appeals of Virginia. It involves the constitutionality of section 192 b of The Tax Code of Virginia. An order noting probable jurisdiction was entered here on the 3rd day of February, 1941, to review a judgment of the Supreme Court of Appeals of Virginia, affirming a judgment of the Corporation Court of the City of Winchester, Virginia.

The case was heard upon a stipulation of facts (R. 15, *et seq.*), a condensed statement of which is as follows:

The Caskey Baking Company, Incorporated, a West Virginia corporation, has its principal office and place of business in the City of Martinsburg, West Virginia. It is domesticated in Virginia. (R. 16.) It complied with the Virginia law relative to foreign corporations, pays its annual registration fee, has fully complied with the State income tax upon its net profits allocable to its Virginia business. (R. 16.)

It is engaged in making and selling bread in the territory tributary to Martinsburg. The bakery products were and are sold to grocers and other retail dealers in Winchester and other places in Virginia. (R. 16, 17.)

These bakery products, after manufacture in Martinsburg, West Virginia, are taken to Virginia in appellant's trucks, by its employees. Each truck is operated over a regular route and at regular intervals. (R. 17.) The employee calls on the grocer and other retail dealers, all of whom are regular customers of appellant, ascertains what amount of bread is needed, gets it out of the truck and delivers the product. (R. 17.) In other words, the bread is sold and delivered at the same time to the regular customer. This practice of selling, or offering for sale, and delivering at the same time is carried on with retail dealers from place to place in Virginia. (R. 17.)

The trucks were operated by employees of appellant, who were paid a fixed salary and who actually made the sales and delivered the bread and other bakery products. These

employees had no interest in the merchandise nor in the proceeds of the sales. (R. 17.)

The bread sold, it was agreed, was not injurious to the health nor damaging to the morals of the citizens of Virginia. (R. 17.)

The appellant here has no place of business in Virginia, except that in accord with the Virginia statute as a domesticated corporation, it had an office (Virginia Code 1936, section 3847), where all claims against it might be audited, settled and paid. (R. 17.)

The appellant has no property permanently located in Virginia; it was not at the time of its arrest a manufacturer taxable on capital under section 73 of the Tax Code of Virginia, nor a distributor of manufactured products paying a license tax on its purchases, nor a licensed wholesale dealer. (R. 17.)

Appellant did not secure the license prescribed by section 192 b of the Tax Code of Virginia, nor pay the tax therein provided for. (R. 16.)

On September 9th, 1938, appellant was arrested in Winchester, Virginia, charged with the violation of section 192 b, as amended by the Acts of the General Assembly of 1938, c. 305, because it sold to J. E. Keffer, a licensed retail merchant, its bakery products manufactured in Martinsburg, West Virginia, without obtaining the license required by the statute just noted. It was agreed that such sale was made in the manner herein stated. (R. 16, 18.)

The appellant was convicted and fined. An appeal was taken to the Corporation Court of the City of Winchester.

For reasons given in writing (R. 19), the Corporation Court found appellant guilty and fined it the same amount as the police magistrate (R. 26). It will be noted that the appellant urged that section 192 b was unconstitutional because it contravenes the commerce clause and the equal protection of the law clause of the United States Constitution (R. 19).

A petition for writ of error was granted and supersedeas awarded by the Supreme Court of Appeals of Virginia.

After hearing, the appellate Court affirmed the judgment in the trial Court (R. 27) for reasons given in the opinion of Mr. Justice Hudgins (R. 28, *et seq.*). It is noted that appellant urged in the Supreme Court of Appeals of Virginia that the statute was and is unconstitutional.

A petition for re-hearing was filed (R. 36), in which the same errors were urged. It was denied on October 16th, 1940 (R. 37).

A petition for appeal to this Court was filed on December 4th, 1940 (R. 38), and allowed the same day (R. 41). Assignment of errors, which were the same as here noted and as urged in the trial court, were filed (R. 40). Statement of points is likewise consistent (R. 44).

OPINIONS BELOW.

The opinion of the Corporation Court of the City of Winchester, Virginia, will be found in the record (R. 19).

The opinion of the Supreme Court of Appeals of Virginia (R. 28), is reported in 10 S. E. (2nd) 535. It has not, as yet, been officially reported.

JURISDICTION.

The jurisdiction of this Court rests upon section 237, Judicial Code, as amended. (28 U. S. C. sec. 344 a).

THE QUESTION HERE.

Appellant is either doing an intrastate business as a peddler, which is the position taken by the appellee, or is conducting an interstate business. If the former, the appellant is the subject of an unconstitutional discrimination; if the latter, the appellee has no right to impose a license as a condition precedent to carrying on an interstate business.

In either event, the Supreme Court of Appeals erred when it affirmed the judgment of the Corporation Court of the City of Winchester, and, as we shall respectfully submit, its judgment should be reversed and the case ordered dismissed.

ASSIGNMENTS OF ERROR.

The Supreme Court of Appeals of Virginia erred:

(a) In refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

(b) In holding that section 192 b, as amended by the Act of 1938, chaper 305, of the Tax Code of Virginia, is not repugnant to Article 1, section 8, clause 3 of the Constitution of the United States.

(c) In holding that section 192 b, as amended by the Acts of 1938, of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

(d) In holding that said section 192 b, as amended by the Acts of 1938, of the Tax Code of Virginia, does not abridge the rights of the appellant, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States, in this, that said Court refused to accept the appellant's contention that said statute,

1. Discriminates in favor of resident manufacturers and against non-resident manufacturers.

2. Denies to the appellant the equal protection of the laws of Virginia.

3. Discriminates in favor of resident peddlers and against non-resident peddlers.

ARGUMENT.

This suit is here on appeal from the Supreme Court of Appeals of Virginia, which, appellant urges, has erred to its detriment in holding a tax statute, as far as it applies to appellant, consonant with constitutional provisions. Appellant urges that this statue controverts the plain provisions of the Constitution in that

(a) It discriminates against appellant and in favor of Virginia residents similarly situated;

(b) It imposes an unjust burden upon interstate commerce.

Appellant has a plant in Martinsburg, Berkeley County, West Virginia, making and producing bread.

It sells its manufactured product to grocers and retail dealers, who are its regular customers. The bread is daily hauled in trucks by its employees over regular routes. The employee ascertains from the grocer how much bread is needed and the bread is delivered from the truck at that time. In other words, the sale is consummated and delivery is made simultaneously.

As noted in the history of section 192 b of the Tax Code of Virginia, the Commonwealth of Virginia in 1938, by amendment provided for a license tax on this character of business, provided the person or corporation did not come under the exemptions therein noted. These exemptions were (a) wholesale dealers regularly licensed by the State, (b) distributors or vendors of motor vehicle fuels, (c) vendors of tobacco, (d) vendors of seafood, (e) a producer of agricultural products, (f) a manufacturer taxable on capital by the Commonwealth of Virginia, and (g) a distributor of manufactured goods paying a State license on his purchases.

The appellant does not come within the provision of any of these exemptions. It is not a producer of agricultural products, nor a vendor of vehicle fuels, tobacco or seafood; it is a manufacturer, but it is not taxed on capital by the State of Virginia (See Appendix A for definition of "Capital", as defined in the Tax Code. See Appendix C for section 192 b of the Tax Code.).

HISTORY OF 192 b OF TAX CODE.

Prior to the amendment of 1938, section 192 b exempted "a producer" from the peddler's license tax. The amendment added the words "of agricultural products" to the word "producer". No effort was made, it will be conceded, to collect any license tax from appellant prior to the passage of the amendment.

Prior thereto, being a producer, appellant was exempt. Evidently the amendment was intended to reach the appellant and those similarly situated, as well as producers of ice and other such products.

When appellant was deprived of its status as a producer, it was discriminated against. It could not be a manufacturer "taxable on capital by this State". The amendment was so drawn that the intention was plain—to discriminatae against all save persons taxable upon capital in Virginia.

It is our contention that

(1) A license tax imposed for the unconditional right of peddling is a revenue tax. When domesticated a foreign corporation is entitled to equal treatment and revenue statutes must conform to the equal protection clause of the 14th Amendment.

(2) The statute, 192 b, under consideration, is unconstitutional, because it makes unreasonable and arbitrary classifications of persons in similar circumstances, in defiance of the plain import of the Fourteenth Amendment.

(3) The statute is unconstitutional, because it renders lawful in the State of Virginia, for all persons taxed upon capital therein, an act unlawful for citizens of other States, under penalty of conviction and fine, unless the latter pay license taxes to which the resident is not subjected.

(4) The statute is unconstitutional, because there is an injurious discrimination against appellant's goods by reason of their source.

(5) The statute is unconstitutional, because it discriminates in favor of persons taxable upon capital in Virginia and against those not similarly situated. Its exemptions are arbitrary and unreasonable.

(6) The method of doing business pursued by appellant is interstate commerce. Because of discrimination against interstate commerce, the statute is unconstitutional.

We will now discuss these several propositions.

1. A license tax imposed for the unconditional right of peddling is a revenue tax. When domesticated foreign corporations are entitled to equal treatment and revenue statutes must conform to equal protection clause of the 14th amendment.

The Virginia Court has held that a license tax imposed for the unconditional right of doing any act, without regulations, is a revenue tax.

Phoebus v. *Manhattan Social Club,* 105 Va. 144, 52 S. E. 839.

Everyone has a common law right to peddle. The statute under consideration simply attempts to raise revenue by taxing this common law right of non-residents to the exclusion of residents of Virginia. This is unequal treatment and results in discrimination of the non-resdent.

When the appellant was domesticated in Virginia, it was put on a level with domestic corporations of the same kind, and stands equal with them. Any tax laws made to apply, after a foreign corporation has been so received into the State, are to be considered laws enacted for the purpose of *raising revenue* for the State and must conform to the equal protection clause. *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494, 71 L. Ed. 372.

2. The statute, 192 b, under consideration, is unconstitutional, because it makes unreasonable and arbitrary classification of persons in similar circumstances in defiance to the plain import of the Fourteenth Amendment. Its exemptions are arbitrary and unreasonable.

Legislation may be adjusted to differences in things and situations, but it is limited to the extent that the 14th Amendment of the Federal Constitution demands that it make no unreasonable or arbitrary classification or discrimination, which amendment requires the same methods to be applied to all the constituents of the class subjected to the taxation and equal and uniform operation upon all persons in similar circumstances.

It will be noted that section 192 b exempts from its provisions a distributor or vendor of motor vehicle fuels, petroleum products, tobacco, seafood, producer of agricultural products, *a manufacturer taxable on capital by Virginia,* or a distributor of manufactured goods paying a State license on his purchases. The law provides for a license tax of no less than One Hundred Dollars ($100.00) for each vehicle used in the peddler's business, from persons not exempt.

It, therefore, appears from these considerations that the appellant occupies a position, under 192 b, which is by no means on an equality with the persons exempted thereby. The exempted parties have an absolute right to peddle their products without paying the tax under 192 b. True, some of those exempted are paying taxes in another capacity, but those taxes are not for the privilege of peddling. They are paid for the rights and benefits which accrue to them as residents of Virginia. For that matter the applicant is likewise paying such taxes in West Virginia and has been domesticated in Virginia to carry on its business of selling bakery products.

Both the resident manufacturer and the appellant pay income taxes on their Virginia business. Both pay corporation taxes. The resident pays a tax on the capital, as de-

fined in section 73 (Appendix A). The appellant does not, because it has no capital in Virginia. The resident manufacturer produces in Virginia; the appellant manufactures in another state. Both sell in Virginia. But because one manufactures in Virginia and hence pays a tax upon capital, and the other does not, the latter is discriminated against.

This situation is reached in the recent case of *Best and Company* v. *Maxwell*, decided this term, (No. 61) Adv. Op. 274, when Mr. Justice Reed said in the concluding paragraph:

> "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language".

Regardless of the tax structure of Virginia and the economic forces which seek to lay taxes to equalize the burden, a tax on capital owned by one person cannot be used as an excuse to exempt this person from a peddler's license, against another in the same class, who, because it is a nonresident, is not liable to be assessed upon capital in Virginia. Both, then, have the privilege, for which one need not pay; the other must. Certainly a tax upon capital cannot be used as an excuse for a discriminatory license tax.

This method is not novel. This Court had this very question before it in *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 20 L. Ed. 449. In that case, persons not permanent residents of Maryland were prohibited from *selling, offering for sale or exposing for sale*, any goods whatsoever, other than agricultural products and articles manufactured in the State, in any manner, whether he be the maker or manufacturer or not, without first obtaining a license to do so.

Mr. Ward, a citizen of New Jersey and not a permanent resident of Maryland, sold by sample certain goods without obtaining the license. He was convisted and appealed.

This Court, speaking through Mr. Justice Clifford, *inter alia,* said

> "Comprehensive as the power of the States is to lay and collect taxes and exeises, it is, nevertheless, clear, in the judgment of the Court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, *without being subjected to any higherk tax or excise than that exacted by law of such permanent residents*".

And again

> "Grant that the States may impose discriminating taxes against the citizens of other States and it will soon be found that the power conferred upon Congress to regulate inter-state commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulation Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States".

A more practical application of the unlawful exemptions of the statute is disclosed, however, by a consideration of the exempted persons. A peddler of seafood can peddle a foodstuff without paying the tax. Is there any real distinction between a peddler of sea food, and a peddler of bakery products? Each is selling nothing more than a foodstuff. Should not the seafood peddler share this burden of taxation, if that be the purpose of the statute? Obviously there is no good reason to tax a peddler of one food and exempt a peddler of another.

Likewise a peddler of tobacco. He can sell after the payment of Five Dollars ($5.00) license tax. There could not be any relation between peddlers of tobacco, sea food and

bakery products, so different, so far as revenues are concerned, that the discrimination could run the range of license taxes from zero to One Hundred Dollars ($100.00).

Admitted is it that for the purpose of taxation a State may classify objects of the tax. But the classification so made must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated or circumstanced shall be treated alike. *Norfolk* v. *Griffin Bros.*, 120 Va. 534, 91 S. E. 640; *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. Ed. 299; *State Bd. Tax Coms.* v. *Jackson*, 283 U. S. 527, 75 L. Ed. 1248. Regard must be had to the particular subject of action. *Smith* v. *Cahoon*, 203 U. S. 553, 75 L. Ed. 1264. Mere difference is not enough; discriminations cannot stand if they offend the plain standards of common sense. *Hartford Steam Boiler Inspection and Ins. Co.* v. *Harrison*, 301 U. S. 459, 81 L. Ed. 1223.

Realizing that the object of Section 192 b is to provide revenue, and recognizing the mandates of the above citations, no substantial difference between a peddler of one foodstuff and the peddler of another can be found. How could the vendor of one food be different from another? Each peddler is similarly situated; the plain standards of common sense are offended.

In *Smith* v. *Cahoon*, 203 U. S. 553, 75 L. Ed. 1264, a Florida statute required a certificate of convenience and necessity for hauling for compensation commodities in trucks on regular routes, exempting those companies "engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point," etc. Speaking for this Court Mr. Chief Justice Huges, *inter alia*, said:

> "But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, *and those who carry for hire bread or sugar*, or tea or coffee, or groceries in general, or other useful commodities."

3. The statute is unconstitutional, because it renders unlawful an act done by a person who is not taxed upon capital in the State of Virginia, unless the non-taxpayer submit to payment of unlawful taxes, that is, lawful if done by one who is or can be taxed upon capital.

What has just been urged, although pertinent, need not be restated.

When it is realized that the situs of the ownership of intangible capital, as defined by said sec. 73, is the domicile of the creditor or the owner, the discrimination against a non-resident or goods of non-resident origin, becomes more apparent. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 79 L. Ed. 171, in interpreting sec. 73, held that money on hand and bills of account receivable have their situs, for purposes of taxation in Virginia. Moreover, as was held also by *Smith* v. *Ajax Pipe Line Co.*, 87 Fed. (2nd) 567, cer. den., 300 U. S. 677, 81 L. Ed. 882; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234, 81 L. Ed. 1061; *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, all intangibles have their taxation situs at the domicile of the creditor or owner. This is true because they cannot be disassociated from the persons from whose relations they are derived. *Curry* v. *McCanless, supra.*

Now, how could any resident manufacturer of Virginia escape taxation on capital by Virginia? It is impossible, regardless of the business the resident might do. Even if he manufacture in another state, he would still be taxable on capital by Virginia. Obviously, then, the exemption of sec. 192 b, given to manufacturers, taxable on capital by Virginia, is a subterfuge used to veil the real intent of the statute. It could have no other purpose. Even the smallest peddler, if he is a resident of Virginia, escapes the license tax because his capital, money on hand, bills receivable, are taxable capital, thus giving him an exemption.

The same argument, then, applies to goods of foreign origin. If a manufacturer of Virginia taxable on capital

peddles them he is exempt because under sect. 73, it is impossible for him to avoid taxation on capital. The exempting provision of the statute is an illegal piece of shrewd legislation. Knowing that no non-resident could, at first instance qualify, the legislature immediately discriminated against goods of foreign origin, protecting local manufacture and manufacturers. Said Mr. Justice Field, in *Welton* v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347:

> "It is sufficient to hold that the commercial power (of the Federal Government over a commodity) continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

From these considerations it must be apparent that the "taxable on capital" exemption is nothing more than a veiled discrimination, which, when brought to light, discloses the obvious intent of the statute to protect local manufacturers to the detriment of those in the same situation as the appellant. No discrimination could be more selective and detrimental in its application.

4. The statute is unconstitutional, because there is an injurious discrimination against appellant's goods by reason of their source.

If there is an injurious discrimination against goods because of their source, the act is unconstitutional.

Probably as apt an illustration of the principal here involved as can be found is the case of *Guy* v. *City of Baltimore*, 100 U. S. (10 Otto) 434, 25 L. Ed. 743. There the Court laid down the law:

> "It must be regarded as settled that no State can, consistently with the National Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale

> therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

After citing and commenting upon *Woodruff* v. *Parham*, 75 U. S. (8 Wall.) 123, 19 L. Ed. 382, *Hinson* v. *Lott*, 75 U. S. (8 Wall.) 148, 19 L. Ed. 387, *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 20 L. Ed. 449, and *Welton* v. *Mo.*, 91 U. S. 275, 23 L. Ed. 347, Mr. Justice Harlan, restating the above principle laid down in the syllabus, said:

> "If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired".

The argument made in this case by the Commonwealth of Virginia is that the indirect tax here laid on non-residents merely evens up the direct tax levied upon residents. The same argument was made in *Guy* v. *City of Baltimore*, in a little different form.

There the City owned the wharves, and, it was argued that it had the right to permit their use without any levy to vessels landing thereat with the products of Maryland. In other words, these vessels were exempt from the payment of wharf taxes, just as here, and it was urged that the vessels, laden with the products of other States, could not justly complain, so long as the wharfage fees were reasonable compensation for the use of city property.

Said Mr. Justice Harlan:

> "This proposition, however ingenious or plausable, is unsound both upon principle and authority."

The Court held the plan was gross discrimination and in effect hindered, obstructed and burdened interstate commerce. Citing *Brown* v. *Md.*, 12 Wheat. 419, Mr. Justice Harlan said:

> "The power of the National Government over commerce with foreign nations and among the several States is broad and comprehensive. *It reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination, by reason of their foreign origin.*"

And this is the law, as declared by the Virginia Court. We come now to a discussion of *Commonwealth* v. *Myer*, 92 Va. 809, 23 S. E. 915, where an ordinance identical to the statute (section 192b) was under consideration. This case was called to the attention of both the Corporation Court and the Supreme Court of Appeals. Both ignored it.

The corporation in *Commonwealth* v. *Myer* occupied the same extrastate position as appellant here, except that it had not been domesticated in Virginia. It sold its products as a peddler, through a non-resident agent, who was the defendant. For failure to pay a peddler's license tax the agent was found guilty. The statute exempted a manufacturer taxable on capital by Virginia. Said Judge Keith:

> "A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the Commonwealth without incurring the penalties denounced by Section 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and does deprive the citizen of another state of the privilege and immunities possessed by citizens of this state, and is an infringement of the provisions of the constitution and therefore void!".

How applicable to the case at bar. It cannot be imagined that any manufacturer in Virginia, corporate or natural, even though manufacturing without the state, is not taxable on capital by Virginia. Sec. 73 of the Tax Code is too inclusive to argue otherwise. It is apparent then, under *Commonwealth* v. *Myer, supra,* that not only the appellant's goods are being discriminated against, because it has not seen fit to be forced into Virginia to manufacture, a re-

sult condemned by *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029, but that the appellant itself is being injured.

5. The Statute is Unconstitutional Because it Discriminates in Favor of Persons Taxable Upon Capital in Virginia and Against Those Not Similarly Situated. Its Exemptions are Arbitrary and Unreasonable.

In addition to the above illustrations of discrimination, section 192 b has a further effect, wherein it exempts a manufacturer taxable on capital by Virginia. To escape the tax the foreign manufacturer must set up a factory in Virginia or become a wholesaler or distributor of manufactured goods. The only argument against this charge of inequity in this regard is that it applies alike to non-resident as well as resident manufacturers, the inference being, as suggested by *Armour* v. *Virginia*, 118 Va. 242, 87 S. E. 610, 246 U. S. 1, 62 L. Ed. 547, that its condition can be as easily met by the non-resident as by the resident manufacturer, and, therefore, it discriminates against neither. And, in any event, appellee contends appellant can become a distributor and thus escape the tax. This makes the appellant concede that it is what it is not. It forces the appellee to admit that up to the State line it is a manufacturer, but that from there on it is a distributor. The resident manufacturer is not a distributor. Why change our status?

An identical situation was considered in *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029. Said Mr. Justice McKenna:

> "To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State, it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products in the first instance being within the State. Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state".

Since the appellant is a corporation domesticated in Virginia, it meets the mandate of *Bethlehem Motors* case, decided after *Armour* v. *Virginia, supra,* which latter case is not applicable to the case at bar, and if it can be so construed, it has been, to that extent, impliedly overruled.

The *Bethlehem Motors* case was called to the attention of both the Corporation Court and the Supreme Court of Appeals, and commented and insisted upon. Both of these courts ignored its existence. To have recognized it and the principle therein declared, would have meant a favorable judgment for appellant. This case clearly determines that the out-of-state manufacturer is not compelled to bring his plant and its facilities into the State of Virginia to escape discriminatory taxation.

And see, also, *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494, 71 L. Ed. 372, heretofore applied, which is clearly in point upon this proposition.

And because appellant will not change its method of doing business and become a wholesaler or distributor, or become a resident manufacturer taxable upon capital, it has been unjustly and ingeniously discriminated against.

Nowhere is this discrimination better illustrated than the exemptions in the act:

Oil and gas peddlers, whether resident or non-resident, are exempt.

Tobacco peddlers, whether resident or non-resident, are exempt.

A producer of agricultural products, whether resident or non-resident, is exempt.

Sea food peddlers, whether resident or non-resident, are exempt.

Manufacturers taxable on capital are exempt. Naturally only resident manufacturers can be taxed on capital (See Appendix A.)

It was noted in *Smith* v. *Cahoon, supra,* that there is no justification for taxing the transportation of one foodstuff and not another. So there is no justification for the distinction between peddling sea food and bread.

Bread is the staff of life. It is a "family supply of perishable nature". It is an article of food, as the Court knows, rapidly becomes stale and is sold for immediate consumption. *Sinclair* v. *Hathaway*, 57 Mich. 60, 23 N. W. 459. Why the difference between peddling butter, milk and eggs, etc., on the one hand, and bread, on the other? The statute makes a difference without a distinction. The statute intends to protect domestic manufacturers of bread from the inroads of the non-resident upon their business. The only way for appellant to eliminate this discrimination is to move the plant to Virginia and become taxed on capital or change his method of business and become a wholesaler or distributor. The discrimination is intentional and outstanding. The reason for it is apparent. Shall this Court permit this character of constitutional evasion to continue?

6. The Method Of Doing Business Pursued by Appellant is Interstate Commerce. Because of Discrimination Against Interstate Commerce the Statute is Unconstitutional.

The lower court relied strongly on *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754, and *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430, to sustain the proposition that peddling is intrastate commerce. These cases simply hold that because the tax was uniform on *all* peddlers, interstate commerce was not burdened. They recognize that the carrying of the goods over a State line is interstate commerce. Said Mr. Justice Pitney in *Wagner* v. *Covington:* "Of course the transportation of plaintiff's goods across the state line is of itself interstate commerce". And quoting from *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 30 L. Ed. 694, he further said:

> "When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; *provided that no discrimination* be made against them as goods from another state, and that they be not taxed

by reason of being brought from another state, but only taxed in the usual way".

And in *Shellenberger* v. *Pennsylvania,* 171 U. S. 1, 43 Law Ed. 49, holding that a statute which prohibits the importation of a marketable article and its sale is void, because beyond the power of the State, Mr. Justice Peckham found opportunity to discuss *Emert* v. *Missouri, supra.* (171 U. S. 1, 23, 43 L. Ed. 49, 57) He stated that the Court in *Emert* v. *Missouri* held the Missouri statute valid, because *it made no discrimination between residents or products of the state and those of other states.* Nor did the Emert case, said he, overrule any of the cases where discrimination to interstate commerce was found and declared.

There must be no discrimination in any form against interstate commerce; when such discrimination appears, however cunning the plan may be or how well concealed in form, this Court has denounced it as an inroad upon the right of Congress to regular commerce or as an evasion of constitutional duty.

Where lack of discrimination is present and the out of state goods are placed upon a par with intrastate commerce, then there is no discrimination and an appeal to constitutional provisions is unavailing. But, in every case, where the burden is apparent, as it is in section 192b, the statute, of necessity, has been held void.

A license tax required for the sale of goods is a tax on the goods themselves. *Brennan* v. *Titusville,* 153 U. S. 289, 38 L. Ed. 719. It is a tax on the business. *Cooney* v. *Mountain State Telephone and Telegraph Co.,* 294 U. S. 384, 79 L. Ed. 934. And therefore a tax on interstate commerce. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613; *Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 353, 58 L. Ed. 1337. The method of sale employed by appellant is interstate commerce. *Commonwealth of Virginia* v. *Myer, supra.* When an extra-state manufacturer, seeking to escape taxation upon the right to sell, is forced by the State of sale to come into that State, or bring assets there for taxation, it is inter-

state commerce and the tax is void. *Bethlehem Motors Corp.* v. *Flynt, supra.*

Or, as put by Mr. Justice Reed, in *Best and Company* v. *Maxwell* (No. 61, decided at this term) Adv. Op. 274, 275:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

And as expressed by Mr. Justice Stone in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48, 84 L. Ed. 565, 571:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

It is submitted, then, that the discrimination against interstate commerce, just as the discrimination against the individual, the object and purpose of the statute, is apparent and that the statute contravenes the plain provisions of the National Constitution.

THE OPINION OF THE LOWER COURT

The basis of the decision by the Supreme Court of Appeals of Virginia was *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157; *Reyman Brewing Co.* v. *Brister*, 179 U. S. 446, 45 L. Ed. 269; *New York* v. *Roberts*, 171 U. S. 658,

43 L. Ed. 323; *Armour* v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754, and *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430.

In those cases no discrimination was discovered, because the license taxes in question applied alike to both resident and non-resident manufacturers. In the *Reyman Brewing Company* case regulation of an intoxicating beverage under the police power, was a controlling factor as well as the question of a tax.

But in the case at bar, section 73 prevents a Virginia manufacturer or peddler from becoming subject to the license tax under section 192 b, at any time. Herein is the distinction between the line of decisions following these cases and the question at hand. This is the gravamen. This is the distinction overlooked by the lower court. No comment was made on this cogent distinction.

SUMMARY

It is respectfully urged that section 192 b of the Tax Code of Virginia is invalid, because:

1. It violates the 14th Amendment to the Constitution of the United States in that it discriminates in favor of resident manufacturers against non-resident manufacturers, and in favor of resident peddlers against non-resident peddlers, and denies to appellant the equal protection of the laws of Virginia.

2. It violates Art. 1, Sec. 8, Cl. 3, the commerce clause of the said Constitution by imposing a burden on interstate commerce, and, particularly a burden to which intrastate commerce is not subjected.

Respectfully submitted,

G. GRAY WILLIAMS,
CLARENCE E. MARTIN,
Counsel for Appellant.

APPENDIX A

TAX CODE OF VIRGINIA

Sec. 73. Capital of any trade or business of any person, firm or corporation, except the capital of any trade or business which capital is otherwise specifically taxed or specifically exempt from taxation. All capital of any trade or business of any person, firm or corporation, except the capital of any trade or business which is otherwise specifically taxed or specifically exempt from taxation.

"Capital as used herein is defined as follows:

First. The inventory of stock on hand, which shall include all materials for use in the business, whether at the place of business, in storage or elsewhere in the State.

Second. The excess of all bills and accounts receivable over bills and accounts payable.

Third. All money on hand and on deposit.

Fourth. All other taxable personal property of any kind whatever, including all choses in action, equities, demands and claims, but excluding the property hereinafter specifically mentioned in this section."

Real estate shall not be held to be capital under this section, but shall be listed and taxed as other real estate.

Machinery and tools used in a manufacturing or mining business taxable on capital under this section shall not be held to be capital under this section, nor shall such machinery and tools be hereafter assessed as real estate. All such machinery and tools used in a manufacturing or mining business taxable on capital under this section shall be listed for local taxation exclusively, and each city, town and county is hereby authorized to make a separate classification for all such machinery and tools and to fix the rate of levy thereon, but such rate shall not be higher than the rate imposed upon tangible personal property in such city, town, county, or district.

This section shall not be construed to apply to any profession which the State regulates by law, nor shall it be construed to include the business of farming. Property

used or employed in such professions, and in the business of farming, shall be taxable in the actual form in which it may be, and not as capital.

(Balance omitted because inapplicable)

APPENDIX B

TAX CODE OF VIRGINIA

Sec. 192. Peddlers. Any person who shall carry from place to place, any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles.

A peddler's license shall not be transferable, and any person so licensed shall endorse his name on said license, and such license shall confer authority to sell within the county or city in which the license was granted and in no other county or city.

Any peddler who shall peddle for sale or sell or barter without a license shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than fifty dollars, nor more than five hundred dollars for each offense; and any person selling or offering to sell as a peddler shall exhibit his license on demand of any citizen of the county or city in which he sells or offers to sell or barter; and upon his failure or refusal to do so he shall be subject to the penalties for peddling without a license.

All persons who do not keep a regular place of business (whether it be a house or a vacant lot, or elsewhere), open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this section. All persons who keep a regular place of business, open at all times in regular business hours and at the same place, who shall elsewhere than at such regular place of business, personally,

or through their agents, offer for sale or sell, and at the time of such offering for sale, deliver goods, wares and merchandise, shall also be deemed peddlers as above, but this section shall not apply to those who sell or offer for sale in person or by their employees, ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced by them and not purchased by them for sale. But a dairyman who uses upon the streets of any city one or more wagons may sell and deliver from his wagon, milk, butter, cream and eggs in said city without procuring a peddler's license.

The license taxes imposed by this section shall not apply to any peddler who is covered by section one hundred and ninety-two-b of the Tax Code of Virginia, and who sells to licensed dealers of retailers only.

(Balance omitted because inapplicable.)

APPENDIX C
TAX CODE OF VIRGINIA

Sec. 192-b. Peddlers of goods, wares or merchandise who sell to licensed dealers or retailers. There is hereby imposed an annual State license tax on every person, firm and corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a farmer, a farmer's cooperative association, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchase) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.

Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.

The annual State license tax hereby imposed, as aforesaid, or every such person, firm or corporation, peddling, as aforesaid, is in the sum of one hundred dollars, for each vehicle used in such business, and the said license shall not be issued quarterly, nor shall it be issued quarterly, nor shall it be transferable, nor shall the tax be subject to proration. The license aforesaid shall be good throughout the State as a State license, but nothing herein contained shall prevent cities and towns from imposing city or town license taxes on such persons, firms, or corporations doing such business within the corporate limits of the cities and towns respectively.

Every vehicle used by any licensee hereunder shall have conspicuously displayed thereon the name of the person, firm or corporation using the same, with the post office address of the licensee, and the license hereby required shall be conspicuously displayed on each vehicle while used in such business.

Every person, firm or corporation claiming to be a distributor and/or vendor of motor vehicle fuels and petroleum products, a farmer, a dealer in forest products or tobacco, or seafood, a producer of agricultural products, a wholesale dealer, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases and selling and delivering at the same time, or offering to sell and deliver at the same time, to licensed dealers or retailers, such goods, wares, or merchandise, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claim other than his or its mere statement, that he or it is exempt from the provisions of this act, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence. The exemption hereby accorded a distributor and/or vendor of motor vehicle fuels and petroluem products and a dealer in forest products or tobacco, is restricted to such peddling of

motor vehicle fuels and petroleum products and forest products, and tobacco; and in the case of a farmer, a producer of agricultural products, or a manufacturer taxable on capita by this State, the exemption is restricted to such peddling of goods, wares or merchandise actually manufactured, produced or grown by the seller.

A peddler, within the meaning of this act, is any person, firm, or corporation who or which, at other than a definite place of business operated by the seller, shall sell, or offer to sell, goods, wares or merchandise to licensed dealers or retailers, and at the time of such sale or exposure for sale, shall deliver, or offer to deliver, the goods, wares, or merchandise to the buyer, and any delivery made on the day of sale shall be construed as equivalent to delivery at the time of sale.

Every person, firm or corporation claiming exemption from the provisions of this act on the ground that he or it is delivering goods, wares or merchandise previously sold to the customer, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claims other than his or its mere statement, which evidence may be an invoice or signed order describing the goods, wares or merchandise involved, and the amount and price thereof, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence.

Every person, firm or corporation violating any provision of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred and fifty dollars for each offense, and each day's violation of any provision of this act shall be deemed a separate offense.

(Balance omitted because inapplicable)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INC.,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

SUPPLEMENTAL STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INC., A CORPORATION,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA,
Appellee.

SUPPLEMENTAL STATEMENT AS TO JURISDICTION.

The appellant in support of the jurisdiction of this Court to review the above-entitled action on appeal, respectfully represents, in supplement to the statement heretofore filed:

Summary.

V.

Under the provisions of Sec. 73 of the Tax Code of Virginia, it is impossible for any resident manufacturer in the State of Virginia to become subject to the provisions of Sec. 192 b of the Tax Code of Virginia as amended by the Acts of 1938, chap. 305. This is, in effect a discrimination against, and a placing of, the goods of another State, at a disadvantage as compared or in competition with intrastate commerce. The discrimination is ingenious and condemned. *Best & Co. Inc.* v. *A. T. Maxwell* (No. 61, October

Term 1940), decided by the Supreme Court of the United States on December 23rd, 1940, and cases there cited; *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.

Sec. 192 b of the Tax Code of Virginia, as amended by the Acts of 1938, chap. 305, allows the peddling of seafood, without the license imposed thereby, whereas it subjects appellant, who is selling another kind of foodstuff, to a license tax.

The following additional cases are submitted to sustain the jurisdiction of this Court:

Best & Co. Inc. v. *A. T. Maxwell,* decided December 23rd, 1940, by the Supreme Court of the United States;

Guy v. *Baltimore,* 100 U. S. 434, 25 L. Ed. 743;

Hale v. *Bimco Trading, Inc.,* 306 U. S. 375, 59 S. Ct. 526, 83 L. Ed. 771;

McGoldrick v. *Berwind-White Coal Min. Co.,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.

WHEREFORE, petitioner submits that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of this action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 676.

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

REPLY BRIEF ON BEHALF OF APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM,-1940.

No. 676.

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

REPLY BRIEF ON BEHALF OF APPELLANT.

To the Honorable Justices of the Supreme Court of the United States:

The brief filed herein by the appellee contains many authorities and statements that *per se* constitute reliable declarations of legal principles. However they are so clearly inapplicable to the case at bar, that counsel for appellant are of the opinion that a reply, illustrating the inapplication of those rules and authorities to the case at bar, would be helpful in arriving at a proper conclusion.

The appellee has formulated new contentions not formerly relied upon by it, and, in several instances has departed entirely from positions heretofore taken.

The divisions and headings of appellant's brief will be followed in this reply, for the sake of consistency and clarity.

Numerals in parenthesis, unless otherwise noted, refer to the pages of appellee's brief under consideration.

I.

The Business Conducted by Appellee in Virginia is not Interstate Commerce, but is Purely Local in Character and Within the Taxing and Regulatory Police Power of the State. (p. 5)

In support of this heading the appellee has cited the cases of *Howe Machine Co.* v. *Gage*, 100 U. S. 676; *Emert* v. *Missouri*, 156 U. S. 296; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, and *Wagner* v. *Covington*, 251 U. S. 95. These cases would apply in the situation at bar if there were no discrimination against the goods because of their out of state manufacture. But in each of these cases, particularly *Wagner* v. *Covington*, which was copiously quoted from by appellee, the Court found that the license tax imposed applied to *all* peddlers, resident and non-resident. And therein lies the distinguishing element not present in the case at hand. In the *Reymann Brewing Company* case regulation of an intoxicating beverage was as much the ground of decision as the question of a tax.

This element, to-wit, unequal treatment of goods moving in inter-state commerce with those within the State, is the distinguishing feature of all the cases. When goods coming into the State are discriminated against—whatever the form, the statute, permitting or causing the discrimination, is in conflict with the constitution. This Court has consistently followed this rule since *Brown* v. *Maryland*, 12 Wheaton 419, 6 L. Ed. 678, decided in 1827. See *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 83 L. Ed. 771.

Moreover, the test of the interstate character of goods is their ultimate destination. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 103; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601. Said Mr. Justice Stone in the latter case:

> "Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress."

The appellant transports across state lines (R. 17) and some of its products, when manufactured, are so intended to be carried. Could it be said that the National Labor Relations Board could not take jurisdiction of appellant's employer and employee relationship?

II.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Police Power to Regulate the Business of Itinerant Peddling. (p. 7)

For the first time the appellant is met with the contention that the more important function of Section 192b is to *regulate* itinerant peddlers. Until this declaration the appellee had insisted that the appellant should bear its full share of taxation in Virginia, and, that because it paid no direct taxes, Section 192b, remedied this omission by imposing upon it an indirect tax and exempting those similarly situated who paid direct taxes.

But appellant pays a far heavier franchise tax than a Virginia corporation. It pays an income tax on the business done by it in Virginia. In fact, it is stipulated that it pays all taxes imposed on it by Virginia, except the one under attack. And why should it be forced to contribute in taxation for the numerous benefits such as ownership, protection of property, and person, which are inherently the rights of a resident manufacturer and without which he likely could not exist, when in fact the appellant is a non-

resident manufacturer and could not use those benefits in any event?

This new position of the appellee falls in the face of *Phoebus* v. *Manhattan Social Club,* 105 Va. 144, 52 S. E. 839, which held that a license tax imposed for the unconditional right of doing any act, without regulations, is a revenue tax. And no regulation of the appellant has been shown in the record nor do the statutes of Virginia provide any.

Moreover, the appellant is a corporation domesticated in Virginia, (R. 16). It has been received there to do business. Any tax laws made to apply to a foreign corporation after such reception are to be considered laws enacted for the purpose of raising revenue and must conform to the equal protection clause of the 14th Amendment. *Hanover Fire Insurance Co.* v. *Carr,* 272 U. S. 494. This doctrine is again laid down in *Conn. Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 82 L. Ed. 673, wherein it was held that a corporation which is allowed to come into a state and there carry on its business, may claim the protection of the 14th Amendment, against a subsequent application to it of state law.

There, the corporation had been engaged in business in the taxing state years before the act became applicable to it. The same is true of the appellant in Virginia.

But if regulation be necessary, because of the itinerant character appellee attributes to appellant's business and in order to protect the licensed retail dealers of Virginia from cheat, fraud, etc., which is the purpose of a license tax on itinerant peddlers, the remedy is constantly available. Appellant has designated a resident statutory agent in Virginia (R. 17) to whom the Commonwealth can complain. An action of *quo warranto* can always be instituted. Consequently, while it is true that the appellant is a peddler, these facts are sufficient to show that the appellant is not an itinerant. Likewise the stipulation nullifies the charge of itineracy, the appellant sells over regular routes, at regular intervals, to regular customers who are licensed retail dealers.

If regulation be the purpose of Section 192b, the discrimination against appellant becomes more evident. No reason exists why the appellant, who is a manufacturer, should be burdened with restrictions and a tax and the peddlers of seafood, tobacco, oil, petroleum products and manufacturers taxable on capital, should be allowed to peddle in the same manner without any hindrance or tax. See *Smith* v. *Cahoon*, 203 U. S. 553.

It has been suggested by the appellee (p. 14) that there is no evidence that the exempted vendors come into competition with the appellant, nor are facts established from which it could be inferred that the exempted vendors are of the character requiring regulation. The Court judicially knows bakery products are manufactured in Virginia, or else that State is totally different from all others. And under section 73 of the Tax Code the manufacturers thereof are taxable on capital and, therefore, exempt from Section 192b. The Court further judicially knows that the method of sale pursued by the appellant has been the universal custom of bakeries and other wholesalers of perishable food products in this country for many years. And undoubtedly, as the appellee will admit, many bakeries manufacturing in Virginia, sell their products in the manner employed by appellant.

Pacific States Box & Box Basket Co. v. *White*, 296 U. S. 176, is the principal reliance of the appellee under this heading. That case was decided solely upon the factual situation. The regulation there attacked was found to be in the public good in order to preserve a fresh foodstuff and set up a standard measure by which the public could be guided in its purchases. No such justification can be found in Section 192b.

III.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Taxing Power and Does Not Unlawfully Discriminate Against Appellant or Deny It Equal Protection of the Laws.

The appellee, under this title, seeks to justify the tax imposed on appellant by showing that it is a part of the tax structure of Virginia. If it is such a part, it only became so by an Act of the Virginia Assembly of 1938, proposed by a legislator from Arlington County, a county separated from the District of Columbia only by the Potomac River. No attempt, previous to the passage of the Act, was made to collect the tax, in fact the statute originally exempted "a producer". The amending Act of 1938 added "of agricultural products", to "producer". (Appellant's brief p. 6) The legislature of Virginia knew that many persons could not be "taxed on capital" unless they came into Virginia and manufactured there.

Appellee contends (p. 17) that the taxing system of Virginia is so constituted that it lays a single capital tax for the right to manufacture, in which is included the right to sell the manufactured product. The answer to that is that the tax on capital, such as is prescribed in Virginia, cannot be said to be for the right to sell, because it is not a privilege tax on the right to peddle, it is a tax based on the amount of capital employed in the business. The manufacturer is paying a tax for the property benefits that accrue to that capital because of its situs in Virginia, not for the right to sell.

If Section 188 of the Tax Code, as contended by appellee (p. 22), substantiates this argument of appellee that the capital tax on the resident manufacturer includes the right to sell, why then was the appellant considered exempt until the passage of Section 192b? And why, also, was Section 73 not confined specifically to manufacturers?

The appellee suggests (p. 20) that the burden on the manufacturer, taxable on capital, may be heavier than on the

peddler. For ought the record shows the tax may be heavier on the peddler. Section 192b imposes a $100.00 license tax on each vehicle employed, not on the entire business. It may very well be, and, is, the case that a non-resident baker could have ten trucks employed in his Virginia business. The fact that the statute was proposed by an Arlington County legislator now becomes pertinent to the question of discrimination against non-resident manufacturers. And the statement of appellee (p. 15) that the peddler's tax amounts only to some thirty odd cents per day, is refuted.

The case of *Wisconsin* v. *C. J. Penny Co.* decided December 16th, 1940, (85 L. Ed. Adv. Op. 223), cited by appellee has no application here. The Court there found a reason for the tax, namely, loss of revenue due to dividend exemptions which the State was seeking to make up by assessing a new kind of dividend tax *which applied both to local and foreign corporations.* The Court found that there was no discrimination.

It is also insisted by the appellee (p. 25) that a resident manufacturer is exempt from Section 192b only when he pays a tax on all the items he possesses. Section 73 does not so provide. If a manufacturer does a cash business, or operates at a loss, according to the appellee's statement, he would not be exempt, if he had no materials on hand or in storage, or money on hand or on deposit. In other words, since real estate, machinery and tools are not capital under the statute, only the affluent manufacturer can be exempt. Obviously if a resident manufacturer pays a tax on any one of the items of capital enumerated in Section 73, he is exempt.

If a Virginia corporation manufactures in another state, the appellee contends (p. 26) that it is not exempt from Section 192b because only its capital actually employed in business in Virginia is taxed. But if it has its offices in Virginia it is taxed on capital. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 79 L. Ed. 171, in interpreting Section 73 held that money on hand and bills of account receivable have their situs for taxation purposes in Virginia. The

situs of intangibles is at the domicile of the creditor, *Smith* v. *Ajax Pipe Line Co.*, 87 Fed. (2nd) 567, cert. den. 300 U. S. 677; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; *Curry* v. *McCanless*, 307 U. S. 357 (bank deposits).

Lawrence v. *State Tax Commissioner*, 286 U. S. 276, has no application to the case at bar. A reasonable distinction for the difference in classification was found, to-wit, the income of a private individual and the income of a corporation.

The Armour Case and the Caskey Case Distinguished.

The Commonwealth of Virginia relies strongly upon the case of *Armour and Company* v. *Commonwealth of Virginia*, 246 U. S. 1, 62 L. Ed. 547, in support of its claim that Section 192b of the State Tax Statute is valid.

The Caskey Baking Company relies strongly upon the case of *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029, 41 Sup. Ct. 571, in support of its position that the Tax Statute is invalid.

These cases apparently reach different conclusions from substantially the same facts and circumstances, but, in reality, the cases can be clearly distinguished.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547, also 118 Va. 242, 87 S. E. 610.

Briefly stated, the facts in this case are as follows: Armour and Co. engaged in packing meat outside of the State of Virginia, which it shipped into Virginia to its regularly established agencies. Armour and Company had no packing plant or manufacturing plant in the State of Virginia.

The State of Virginia enacted a statute which imposed a license tax for the privilege of engaging in business in Virginia as a merchant. The amount of tax imposed by this statute was determined by the amount of purchases made by the merchant, and all goods manufactured by the merchant were construed to be purchases within the meaning of the act.

This tax was applicable to all merchants doing business in the State of Virginia, except,

> "This section shall not be construed as applying to manufacturers taxed on capital by this state, who offer for sale at the place of manufacture, goods, wafes and merchandise manufactured by them."

Armour and Company paid the tax based upon all purchases of goods and merchandise, manufactured by other manufacturers, and sold by its agencies established in Virginia, but declined to pay a merchant's tax based upon the amount of merchandise manufactured by itself and sold in Virginia.

Armour and Company attacked the validity of the statute upon the same grounds upon which we are attacking the validity of Section 192b of the Virginia Tax Statute. The Supreme Court, in the *Armour* case, held the statute to be valid. It based its holding solely upon the ground that Virginia made a reasonable and proper classification, when it imposed a tax on manufacturers who did not sell their products at the place of manufacture, while it did not impose the tax upon manufacturers who sold their manufactured products at the place of manufacture.

The confusion arises from the unwarranted assumption that the Supreme Court intended to hold that the classification was based upon whether or not the manufacturer was taxed on capital by the State of Virginia. It is true that the statute makes reference to manufacturers taxed on capital by the State of Virginia, but, apparently, it was not contended by counsel representing Armour and Company that this constituted part of the classification that was unreasonable and illegal. The opinion of the Court is based specifically upon the fact that the purpose of the Virginia Legislature was to exempt from the tax the manufacturer who sold his products at the place of manufacture without regard to the payment of tax or capital.

In the case at bar the statute applies to all wholesale peddlers and, by way of classification, exempts all manufac-

turers taxed on capital by this state, irrespective of where they sell their goods or the manner in which they peddle. We are, therefore, presenting a new problem to the Court, not decided in the *Armour* case, to-wit: is it a reasonable and proper classification to differentiate between a manufacturer taxed on capital by the state imposing the tax, and a manufacturer not taxed on capital? For the reasons clearly outlined and discussed in the opening brief of the Caskey Baking Company, it is obvious that this is not a reasonable or proper classification. Particularly is this true because it is impossible for a non-resident manufacturer to be taxed on capital by the State of Virginia, unless he engages in the manufacturing business within Virginia, a condition impossible of performance by the foreign manufacturer.

Bethlehem Motors Corp. v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029.

In this case the facts may be briefly summarized as follows:

The Bethlehem corporation was a Pennsylvania corporation engaged in the business of manufacturing motor trucks. The National Motor Car Corporation was an Indiana corporation engaged in manufacturing automobiles. W. Irving Young & Company was a Delaware corporation employed as the agent of said manufacturing corporations to sell their trucks and cars in the State of North Carolina. This Delaware corporation conducted its agency business through the Liberty Motors Corporation and the National Motors Corporation, which were North Carolina corporations. The automobiles and trucks were consigned to the North Carolina corporations, and were sold direct by them from their storage warehouse.

A North Carolina statute required that every manufacturer of automobiles, engaged in the business of selling the same in that state, should pay a license tax of Five Hundred Dollars ($500.00). This statute then exempted partially from the payment of this license tax, manufacturers

who invested at least three-fourths of their entire assets in the bonds of the state, or any of its counties, cities and towns, or in property situated therein, which was returned for taxation. Manufacturer who so invested paid only one-fifth, or One Hundred Dollars ($100.00).

The Bethlehem Motors Corporation, and others, brought suit to restrain the enforcement of the tax upon the ground that it constituted a discrimination against non-resident manufacturers, in violation of the equal protection clause of the 14th Amendment; and upon the additional ground that the act was an attempt to regulate interstate commerce in violation of Article I, Section 8 of the Constitution. This Court held that the tax statute violated both of these provisions of the Constitution. In holding that this tax statute violated the equal protection clause and constituted discrimination, the Court said this:

> "The condition can be satisfied by a resident manufacturer, his factory and his products in the first instance being within the state; it cannot be satisfied by a non-resident manufacturer, his factory manifestly being in another state, some of its products only at a given time being within the state."

As to the commerce clause, the Court held:

> "It is the finding of the Court that the automobiles were in the hands of the agents of the consigning corporations and, therefore, a tax against them was practically a tax on their importation into the state."

The distinction between the *Armour* case and the *Bethlehem Motor* case is this: that in the *Armour* case the statute classified merchants according to the place from which merchandise was sold; while in the *Bethlehem* case there was, in reality, no classification. This is also true in the *Caskey Baking Company* case. However, even if there were an attempted classification in the *Bethlehem Motors* case, the classification was held to be a discrimination because of the inability of the non-resident manufacturer to comply,

hence the classification was unreasonable. Where a condition cannot be performed, it is unreasonable.

Therefore, it can certainly be said that the *Armour* case and the *Bethlehem Motor* case are quite different and that the *Armour* case does not rule the instant case. We do not think that the Supreme Court is now being called upon to reverse the holding in the *Armour* case; nor do we think that the *Bethlehem Motor* case had the effect of reversing that holding. The cases are clearly distinguishable, and the *Caskey* case clearly comes within the holding of the *Bethlehem Motor Company* case.

IV.

The Challenged Statute Does Not Unlawfully Discriminate Against Appellant's Goods by Reason of Their Source or Place of Manufacture, or Otherwise.

It is admitted by appellee that if a statute discriminates against goods because of their source or place of manufacture, then the statute is unconstitutional. But appellee denies that Section 192b has this result. However, a consideration of the operation and effect of the statute, which is the true test, does result in a discrimination against the products of the appellant because of their place of manufacture. Any person, with the United States Constitution as his only authority, would say that from the facts and circumstances in this case, there is an actual discrimination.

In *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, a statute identical with Section 192b, was held to be discriminatory in effect, because it forced the extra state manufacturer into the state in order to escape the tax. And appellant admits that the only manner in which the appellant as a manufacturer can escape the tax is to come into the State of Virginia.

Appellee suggests that appellant can escape the peddlers' tax by becoming a wholesaler or distributor in Virginia. Appellant probably could but it would lose its identity as a manufacturer, a burden which the resident manufacturer is

not compelled to assume. Why should appellant concede that it is what it is not?

A corporation in Virginia, as has been pointed out heretofore, cannot escape the tax on capital. It is an impossibility, even though the manufacturing is performed without, so long as its offices are located within the State. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15. If its offices and factory are situated outside of the State then the tax immediately applies and the discrimination becomes evident. Once out of Virginia and you are taxed, stay in and you are exempt.

The cases cited by appellee under this heading, to illustrate the lack of discrimination, do not apply to the case at bar.

Hammond Packing Co. v. *Montana*, 233 U. S. 331, taxed oleomargarine but exempted butter. The distinction was held reasonable, just as it was in *Capital City Dairy Co.* v. *Ohio*, because oleomargarine could be so manufactured as to be harmful to the public. In appellant's case it has been agreed no such harm exists. (R. 17.)

Armour Packing Co. v. *Lacy*, 200 U. S. 226, upheld a statute levying a tax on the operation of meat packing houses, but not on merchants selling the products thereof. The two occupations were different from each other, and the tax applied to non-residents as well as residents.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, declared valid classification for taxation of bituminous coal and anthracite, the one being taxed, the other exempt. Obviously so, The Court found that the uses to which the former could be put differentiated it from mere fuel, which was the only use for anthracite coal.

In *Quong Wing* v. *Kirkendall*, 223 U. S. 259, a differentiation between the subjects of taxation was sufficient to justify the classification was found by the Court.

In *Alaska Fish Salting and By Products Co.* v. *Smith*, 255 U. S. 44, a manufacturer of fertilizer from herring was taxed but a manufacturer of fertilizer from other fish was not taxed. The Court found that the general welfare, and

consideration of natural resources justified the distinction.

In *Indiana* v. *Jackson*, 283 U. S. 527, the classification of the operator of a chain store system as distinct from the operator of a single store, for taxation purposes, was held reasonable. The advantages and disadvantages distinguishing the former from the latter determined that they were not similarly situated.

In *Madden* v. *Kentucky*, 309 U. S. 83, a higher tax on deposits of residents in out of state banks than on deposits in local banks was held constitutional. The difference in the difficulties of collection, the latter being self enforcing and the former difficult of enforcement, sustained the distinction.

In *Hicklin* v. *Coney*, 290 U. S. 169, it was found that the persons exempted, farmers, dairymen, etc., either transported their own products or transported the products of others so infrequently, not as a regular business, that their inclusion in a class distinct from persons operating as contract carriers for hire, was reasonable. A tax on the latter class was, therefore, held valid.

In *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, a statute exempted persons who carried their own livestock and farm products to market, or supplies for their own use in their own motor vehicles, at seasonal times, and also persons in a city or town or who operated within a twenty-five mile radius thereof, and taxed persons who used the highways of the State constantly for the transportation of their products. The distinction was held valid because the former used the highways infrequently and therefore demanded less regulation than those using them almost daily.

In all of the above cases cited by appellee it will be particularly noted that there was no distinction or classification made which was based upon the fact of residence in or out of the State. The statutes applied to all alike.

SUMMARY.

It is respectfully urged, therefore, that the authorities cited by the appellee and the contentions based upon them, have no application to the case at bar, that the assignments of error should be sustained, and that the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INCORPORATED, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA, APPELLEE.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE APPELLEE

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APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia, pursuant to which the decree appealed from was entered, is reported in 10 S. E. (2nd) at page 535. It also appears at page 28 of the record. The opinion of the Corporation Court of the City of Winchester has not been officially reported, but appears in the record at page 19.

GROUNDS OF JURISDICTION

The appellant challenges the validity of section 192-b of the Tax Code of Virginia as in violation of the commerce clause, and also because of alleged deprivation of equal protection of the laws. The appeal is pursuant to section 237 of the Judicial Code, as amended.

STATEMENT OF THE CASE

Section 192-b of the Tax Code (Appendix C. Appellant's brief) imposes an annual tax of $100 upon peddlers of goods, wares and merchandise who sell to licensed dealers or retailers. There are certain exemptions, but appellant does not claim to come within any of them. It is not disputed that, if the statute is valid, appellant is liable for the tax.

In addition to the imposition of the tax, said section also contains various specific regulatory provisions with respect to peddlers which will be considered in detail later. (The Virginia Tax Code is published as an appendix to Michie's 1936 Code of Virginia.)

The facts are not in dispute. (See stipulation R. pp. 16-18.) The appellant is a West Virginia Corporation which has qualified to do business in Virginia. The only business of any kind which it does in this State consists of peddling bakery products to licensed Virginia retailers. Appellant owns no property of any kind in Virginia. It carries on its business solely from motor vans or trucks, which are domiciled at the home office in West Virginia. It's employees operate these vehicles

over regular routes and call upon the Virginia retailers, selling, and delivering to them simultaneously, the products sold. These products the appellant manufactures in West Virginia, but takes no previous orders for their sale from the Virginia retailers. The sale and delivery in Virginia constitute but a single transaction.

QUESTIONS PRESENTED

The appellant challenges the validity of the statute upon the following grounds:

1. That the business of peddling its bakery products in Virginia constitutes interstate commerce, and the State is without power, because of the commerce clause, to require a license for same or to impose a license tax.

2. That the exemption from the requirement of securing a peddler's license accorded to Virginia manufacturers who pay a tax upon their capital operates as an unlawful discriminaation against appellant and appellant's products, and as a denial of equal protection of the laws ,and constitutes as well a violation of the commerce clause.

3. That the exemption from the statute of vendors of motor vehicle fuels and petroleum products, tobacco and sea food, and of producers or growers of the agricultural products they sell, works a discrimination against appellant's bakery products, and, therefore, deprives it of such equal protection.

The appellee contends:

(a) That the business of peddling bakery products

engaged in by appellant (which is the only business it does in Virginia) is not interstate commerce but is purely local in character, and is subject to the regulation and taxation provided for by the challenged statute.

(b) That the exemption of Virginia manufacturers who pay a tax upon their capital does not discriminate against appellant because:

(1) Under Virginia's tax structure the payment of the capital tax constitutes payment for the incidental privilege of selling the goods manufactured; and,

(2) Such a manufacturer, having a permanent fixed place where or from which he conducts his business in Virginia, there is no necessity for subjecting him to the regulatory provisions of the statute.

In reply to appellant's contentions and in support of its own, the appellee will undertake to maintain the following propositions:

OUTLINE OF ARGUMENT

I. The business conducted by appellee in Virginia is not interstate commerce, but is purely local in character and within the taxing and regulatory police power of the State.

II. The challenged statute is a reasonable and proper exercise of the State's police power to regulate the business of itinerant peddling.

III. The challenged statute is a reasonable and proper exercise of the State's taxing power and does not unlawfully discriminate against appellant or deny it equal protection of the laws.

IV. The challenged statute does not unlawfully discriminate against appellant's goods by reason of their source or place of manufacture, or otherwise.

ARGUMENT

I.

The Business Conducted by Appellee in Virginia is Not Interstate Commerce, But is Purely Local in Character and Within the Taxing and Regulatory Police Power of the State.

Appellant's business which is taxed by Virginia is *not* interstate commerce. It is selling and delivering at the same time merchandise in Virginia, no previous orders having been taken therefor. This is peddling and it has long been settled by the decisions of this court that peddling in a State is purely *intrastate* commerce, it being immaterial that the goods are brought in from another State. *Howe Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296; *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445; *Wagner* v. *Covington,* 251 U. S. 95.

The leading case is probably *Emert* v. *Missouri,* but *Wagner* v. *Covington* is the more recent and presents a factual situation so nearly identical with the instant case that the court's special attention is directed to it. There a manufacturer of soft drinks in Ohio sent into Kentucky its trucks with its employees thereon for the purpose of selling the merchandise in Kentucky and delivering it at the same time without previous orders—in other words, peddling in Kentucky goods manufactured in Ohio and sent to Kentucky for that purpose. This court held that this was purely *intrastate* commerce in

Kentucky. It is difficult to conceive a case involving facts more similar to those in the case at bar, and the reasoning and conclusion therein obviously disposes of appellant's contention that it is engaged in interstate commerce in Virginia. This court said:

> "Of course, the transportation of plaintiff's goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. *So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.*" (251 U. S. 103. Italics supplied.)

And so here, while the goods may move into Virginia in interstate commerce, that is not the business that is taxed. Virginia taxes the peddling only.

Appellant seeks to distinguish the case at bar from *Wagner* v. *Covington* by reason of the statement in the opinion that if goods brought into the State for sale are discriminated against because of their source then they have not become part of the general property of the State and the discrimination, in such a case, is against interstate commerce. But this contention is predicated

upon the assumption that the appellant's products have been discriminated against. Whether there has, in fact, been any such discrimination is, of course, the question upon which the whole case turns. This question will be hereinafter fully discussed in its appropriate place.

II.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Police Power to Regulate the Business of Itinerant Peddling.

Section 192-b of the Tax Code, here challenged, is not intended solely as a revenue measure. Perhaps its more important function is to regulate *itinerant peddling* to retailers. The necessity for such regulation has long been universally recognized. As said by this court in *Emert* v. *Missouri*, 156 U. S. 296, 306, "From early times in England and America there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practice their trade". The opinion refers to many old English and American statutes of this type, and quotes the following from an opinion of Baron Graham:

> "The object of the legislature, in passing the act upon which this information is founded, was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the michiefs of being undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such

persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." (156 U. S. 307.)

The article on "Peddlers" in Ruling Case Law (Vol. 21, p. 180), after commenting on the fact that those following that occupation "have received general and very uncomplimentary notice", goes on to say that "Not the least of the difficulties of the peddler situation is that in case of breach of warranty, breach of contract, fraud, cheating, or even theft by the peddler, he is generally out of sight or beyond the reach of process when sought." (Id. pp. 182-3.) And further, "The universal method of guarding against deceptions, deceits and such probable abuses of peddling has been to require all persons who wish to engage in the trade in the state or community, as the case may be, to secure a license." (Id. p. 187.) It is common knowledge that irresponsible itinerant peddlers frequently sell stolen goods and articles smuggled into this country to avoid tariff charges.

The regulatory purpose of section 192-b is manifest from its provision that "Every vehicle used by any licensee hereunder shall have conspicuously displayed thereon the name of the person, firm or corporation using the same, with the post office address of the licensee, and the license hereby required shall be conspicuously displayed on each vehicle while used in such business."

The section further provides that any person claiming

to be exempt from the license requirement, or asserting that he is delivering goods previously sold, shall, upon request of an authorized officer, furnish evidence thereof in addition to his own statement. Failure to furnish such evidence is declared to be "sufficient ground for charging the person operating the vehicle with a violation of this act."

Statutes regulating peddling are designed to remedy the well known mischiefs above referred to which are common to the business of the *itinerant* peddler, who has no established place of business in the State. Licensed wholesale merchants and licensed distributors with such permanent establishments are not within the class sought to be regulated. In fact they have already secured a license of a different kind.

Appellant's chief complaint of discrimination is based on the fact that the statute does not apply to a manufacturer selling goods of his own manufacture who has paid a tax upon capital, the method adopted by Virginia for taxing manufacturers. Such a person or corporation, however, has an established place of business in the State, and his activities are within the cognizance and reach of the State law enforcement authorities. Unlike the *itinerant* peddler, he can be found when wanted. It is not necessary or reasonable that he should be subjected to the same regulation as the transient peddler, who is here today and gone tomorrow. The Virginia manufacturer is not an itinerant, nor is he a peddler within the meaning of the statute. Selling the goods he has made is an inherent part of his business, just as much so as the making of them.

The appellant contends that, since it is a manufacturer in West Virginia, the laws of Virginia should be so framed as to recognize it in a different class from the ordinary itinerant peddler. But any such attempted statutory classification or exemption of appellant would obviously apply equally to every operator of a vehicle who manufactures in any State in the Union. It would be an impossible task for the Virginia enforcement officers to determine the truth of an itinerant peddler's claim that he is exempt because he manufactured his goods in a distant State such as California. Furthermore, so far as Virginia is concerned, the only status the appellant occupies is that of an itinerant peddler to retailers. Virginia has no relations with it *as a manufacturer* and it is immaterial to the State whether it manufactures its products or buys them from others.

Nor is the amount of the fee or tax charged for the license an unreasonable one from a regulatory standpoint. Its obvious purpose is to discourage irresponsible people of the "fly by night" class from engaging in the business and to restrict it to those who intend to enter into it upon a reasonably large scale and with some degree of permanency. To this end the statute provides that the license is not transferrable and is not subject to proration. The annual charge of $100, as applied to appellant who is regularly engaged in the business amounts to only about thirty cents per day. In *Emert* v. *Missouri, supra,* the amount of the peddler's license tax sustained was $50. This was in 1894, at a time when a dollar had many times the purchasing power it has today. In *Wagner* v. *Covington, supra,*

the annual license tax was $150. (See report of case in 197 S. W. 807.)

Appellant complains of the exemption from the statute of vendors of motor vehicle fuels and petroleum products, tobacco and sea food, and of farmers selling produce grown by them as discriminatory against it. Exemptions of this kind are commonly found in such statutes. As stated in the Ruling Case Law article, *supra;* "The great majority of statutes affecting peddlers make exemptions in favor of persons peddling goods of special classes. The validity of such a statute depends on whether the commodity exemption is reasonable. A very common instance is the exemption of persons peddling farm products, as truck, meat and milk, which have been produced on their own land." (21 R. C. L. 199-200.)

With respect to motor vehicle fuels and petroleum products, these are not the types of goods that itinerant peddlers sell, or that retailers would buy from them. The only retailers handling such products are filling stations and garages, and they almost invariable purchase their supplies from a particular oil company. These oil companies always have permanent places of business in the State, with large tanks and much expensive equipment. There is no reason for their regulation as itinerant peddlers because they are not transients. All sales of tobacco are made in warehouses and are subject to both State and Federal regulation. *Currin* v. *Wallace,* 306 U. S. 1.

Appellant complains of the exemption granted peddlers of sea food. Virginia is a seaboard State and in

the Tidewater section the sea food industry is an important one. Sea foods are very highly perishable, however, and require prompt icing, and it is essential that there be no impediment to their immediate marketing. The character of the food is ill adapted to the itinerant peddler, and no reason exists why this regulatory statute should apply to it.

But the appellant has neither alleged nor proven any facts or state of facts which tend, in the slightest degree, to sustain its claim that the classification contained in the statute is unreasonable or arbitrary. The classification is presumed to be reasonable and the burden rests upon him who challenges it to prove the contrary.

That this omission to prove the non-existence of such facts, or states of facts, is fatal to its case, is conclusively established by this Court's decision in the case of *Pacific States Box and Basket Co.* v. *White,* 296 U. S. 176. The Oregon Department of Agriculture had promulgated a regulation prescribing certain types of containers for the marketing of strawberries and raspberries. The plaintiff box company sought an injunction from the Federal District Court against the enforcement of the regulation on the ground that it was arbitrary and unreasonable and granted a monopoly to manufacturers of other types of containers. The case was heard on a motion for a preliminary injunction and the defendants' motion to dismiss the bill. This raised directly the question of the sufficiency of the allegations of the bill to negative the existence of any state of facts which would render the legislation proper. On this question this Court, in an opinion by Mr. Justice Brandeis, said:

"Plaintiff contends that since the case was heard on motion to dismiss the bill, all allegations therein made must be accepted as true; and, among others, the charge that 'there is no necessity for the particular orders relating to strawberries or raspberries based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described * * * does not of necessity promote, protect, further or develop the horticultural interests of the State;' and that its necessary effect is 'to grant a monopoly to manufacturers of the so-called hallocks.' The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland,* 107 U. S. 38, 27 L. ed. 370, 2 S. Ct. 44. *When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts,* and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209. *The burden is not sustained by making allegations which are merely the general conclusions of law or fact.* See *Public Serv. Commission* v. *Great Northern Utilities Co.,* 289 U. S. 130, 136, 137. *Facts* relied upon to rebut the presumption of

> constitutionality *must be specifically set forth.* See *Aetna Ins. Co.* v. *Hyde,* 275 U. S. 440; *O'Gorman Young* v. *Hartford F. Ins. Co.,* 282 U. S. 251; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. (296 U. S. 176. Italics supplied.)

There is no evidence that the exempted vendors of these particular commodities complained of come into competition with appellant or its products, nor are any facts established from which it could be inferred that such vendors are of the character requiring regulation. The legislature is presumed to have known the facts, and it is presumed that facts exist to support the legislative classification. While the appellant's brief abounds with statements of conclusions of fact or law that it is discriminated against, the facts themselves on which these conclusions are supposed to be based have not been adduced. The presumption is, however, that the facts sustain the legislative action and, if appellant claims that the necessary facts do not exist, the burden is on it to prove such non-existence. Certainly the statute has not been shown to be an unreasonable or improper exercise of the State's regulatory powers over itinerant peddlers.

III.

The Challenged Statute is a Reasonable and Proper Exercise of the State's Taxing Power and Does Not Unlawfully Discriminate Against Appellant or Deny It Equal Protection of the Laws.

Viewed solely from the standpoint of the State's taxing power, the statute constitutes, as to appellant, a reasonable and proper exerices of same. Appellant is engaged in local business as a peddler in Virginia the year round. Aside from the $100 annual charge on its license, its tax contribution to Virginia is insignificant. It enjoys the police protection afforded by the State in the operation of its trucks and the conduct of its business. It may invoke the aid of Virginia's courts in the collection of debts due it and in redressing wrongs suffered. It makes daily use of Virginia highways in the prosecution of its business, not even paying the cost of a State automobile license tag. It pays no State gasoline taxes for maintenance of the highways it uses. See paragraphs two and eight of the stipulation (R. 16-17). It is the well known custom of owners of a fleet of trucks to purchase their gasoline in large quantities at commercial consumer prices, which are usually less than the filling station operators pay.

Appellant no doubt purchases its gasoline at the home office in West Virginia, stores it in tanks there, and fills up its trucks every morning before their departure. The gasoline tax (five cents per gallon) would doubtless greatly exceed the thirty odd cents per day charged for the peddler's license. It is apparently appellant's desire to enjoy the protection of Virginia's laws and

enforcement officers, as well as the use of her highways, without making any substantial payment therefor. And appellant enjoyed this status unchallenged until 1938 by reason of the provision in section 192-b before that time exempting "a producer or manufacturer taxable on capital by this State." There being some doubt as to whether the term "producer" included a nonresident manufacturer not so taxable, no effort was made to enforce the statute against the appellant and for several years it escaped the payment of any substantial tax. This was true also of other peddlers who claimed to be "producers". In 1938 the statute was amended and the meaning of the word "producers" was clarified by the addition of the words "of agricultural products", as was no doubt the original legislative intention. Of this amendment appellant complains, laboring apparently under the belief that because it is a West Virginia corporation it is entitled to carry on the business of a peddler in Virginia free from any obligation to contribute itse proper share to the operation and maintenance of the Virginia Government, the laws of which protect said business. In fact, appellant seems to contend that it is entitled to preferential treatment in matters of taxation; that its nonresidence affords it some sort of immunity. That the contention is unsound was long ago established by the decisions of this court. Thus, in *Shaffer* v. *Carter,* 252 U. S. 37, 52-3, the rule was thus stated:

> "That a state, consistently with the Federal Constitution, may not prohibit the citizens of other states from carrying on legitimate business

within its borders like its own citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Sec. 2 of Art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption."

But the appellant also contends that it is discriminated against because it is required to secure a peddler's license and pay a tax on same, while a Virginia manufacturer who pays a tax on capital is not required to pay also a peddler's license tax. This contention ignores the fact that the sale of the manufacturer's products is an essential, inherent part of the manufacturing business. If he does not sell his products, he cannot continue to manufacture. And Virginia's taxing system

has long recognized this obvious truth and taxed the business as a whole, laying a single tax on the making and selling of the goods. The tax is, in legal effect, a tax on the privilege both of manufacturing and of selling, in any manner desired (except at a separately established store), the goods manufactured.

The State is not required to levy taxes identical in form or amount upon nonresidents and residents, or upon residents when not engaged in identical occupations. The appellant is not classified for taxation as a manufacturer in Virginia, nor can the State's system of taxing manufacturers on capital be applied to one who has no capital in Virginia to tax. And the decisions of this court clearly sustain this principle. *Travellers Insurance Company* v. *Connecticut,* 185 U. S. 364, involved an apparent discrimination resulting from the imposition of a State tax on shares of stock in a corporation owned by nonresidents, while no *State* tax was imposed on such shares owned by residents. "But", said the court, "this apparent discrimination against the nonresident disappears when the system of taxation prevailing in Connecticut is considered. By that system the nonresident stockholder pays no local taxes. He simply pays a state tax,—contributes so much to the general expenses of the state. While, on the other hand, the resident stockholder pays no tax to the state, but only to the municipality in which he resides. * * *" (185 U. S. at page 367.)

In *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, 283-4, an individual assessed with a tax on income derived from activities outside the State

claimed he was deprived of equal protection because his competitor corporations were relieved from the tax on income from such outside activities. In denying the validity of the claim, this court held that whether discrimination exists is a question of fact, involving local conditions in Mississippi and neighboring States, as well as "how the statutory provisions now in question are related to others by which a permissible divergence in State policy with respect to the taxation of corporations and of individuals may be effected." This relation not being shown, "we cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made." And Mr. Justice Stone said further that "acceptance of this contention would relieve the appellant from the burden which rests on him to overcome the presumption of facts supporting constitutionality," and at page 284 of 286 U. S. it is added that:

> "The equal protection clause doese not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

And so in the case at bar, appellant has completely failed to adduce any facts showing or even tending to show any inequality in the tax burden placed on it by

section 192-b and that imposed on the manufacturer of bakery products who is taxed under section 73 of the Tax Code (Appendix A. Appellant's brief), and in addition pays other taxes. The mere fact that appellant and Virginia manufacturers are taxed in a different manner raises no presumption of inequality in the tax burden. On the contrary, the presumption is that there is no such inequality.

Indeed, for aught the record discloses, the burden upon the manufacturer taxable on capital may be heavier. We have seen that the one thing the appellant is doing in Virginia is pedding. If Virginia does not tax that business, there is nothing to tax. The stipulation discloses that appellant has no property here and does not even pay a license tax on its automobile used in its Virginia business, or a gasoline tax. The only tax it pays is the small net income tax from its Virginia business if it makes any income. So, it is repeated, *if its peddling is not taxed, it goes practically tax free,* although in active competition with Virginia business.

Now take the case of a manufacturing corporation taxable on capital in Virginia. It necessarily has property here and is taxable on its capital here. Section 73 of the Tax Code. (Appendix A of appellant's brief.) It is subject to local taxes on its real estate. It pays license taxes on its automobiles and trucks. It is subject to gasoline taxes and, of course, the State income tax. If it is a Virginia corporation, it pays not only an annual registration fee but an annual franchise tax. Section 211 of the Tax Code. In addition, of

course, the manufacturer in Virginia employs people, who in turn have homes here and pay their taxes here. From these taxes Virginia benefits, and the Legislature has said in effect that, the business having been sufficiently taxed, and products of its manufacture may *as a part of incident thereof be peddled without additional tax.*

It has long been Virginia's policy to so frame its taxing system as to avoid imposing upon a business or occupation a number of different kinds of taxes, and to make one tax, or as small a number as possible, suffice to cover the whole activity. Thus, merchandise brokers pay a graduated license tax which is declared to be "in lieu of a tax on the capital" employed (Tax Code, section 171), building and loan associations (section 172), and wholesale and retail merchants (section 188), and insurance companies (section 239) are similarly dealt with. Railway companies are taxed on rolling stock, intangible personal property, money and gross receipts in lieu of all other State taxes, and pay no income or capital taxes (Tax Code, sections 215 and 216). The same general principle is followed with respect to State taxation of pipe line transmission companies (section 216-a), express companies (section 219), and sleeping car companies (section 223). The foregoing are sufficient to illustrate the policy of the State's system of taxation to avoid a multiplicity of taxes, and at the same time to equalize the tax burden imposed on the taxpayers so far as this is possible of accomplishment.

And the policy of including within the privileges

paid for by the capital tax on the manufacturer, that of selling and delivering at the same time to retailers, was established long before the enactment in 1932 of section 192-b. Witness the following paragraphs from section 188 of the Tax Code which have been in the section in substantially the same form since 1928:

> "A manufacturer taxable on capital by the State may, except as in this section provided, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any license tax of any kind for such privilege to the State, or to any city, town or county.
>
> "A wholesale merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege to the State, unless otherwise provided by law."

Thus section 192-b of the Tax Code, in granting this privilege to wholesalers and manufacturers taxable on capital, is simply continuing this previously established policy of taxation. It is manifest, therefore, that the

challenged exemption is not directed at appellant or its goods, but that it was necessary to include it in the Act to make it conform to then existing statutes. And the principle that the validity of any particular item of a system must be tested by a consideration of the tax structure as a whole was emphasized in the recent case of *Wisconsin* v. *J. C. Penny Co.*, decided December 16, 1940, (85 L. ed. Adv. Op. 222, at page 224), where this court said:

> "As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system. The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. * * *"

And this principle of looking to the State's taxing system to determine whether there has been unlawful discrimination was applied in the case at bar by the court below, when it said (Op. R. p. 34):

> "These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them."

But, in spite of this well established State policy of so classifying subjects of taxation as to avoid a

multiplicity of taxes on each subject, appellant insists that, in order to meet the constitutional requirements of equal protection, Virginia must separate the business of a manufacturer into two parts, and impose one tax on the manufacture of goods and another and separate tax on the privilege of selling the goods manufactured.

That this position of appellant is not maintainable necessarily follows from the decision of this court in the case of *Armour and Company* v. *Virginia*, 246 U. S. 1. The statute there involved was what is now section 188 of the Tax Code (above quoted from), which imposed a merchant's license tax on wholesale and retail merchants measured by the volume of business done. The section exempted from the license tax "manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them". Armour and Company, a New Jersey corporation not so taxable, contended that, since it was required to pay a *license* tax to sell the goods it manufactured outside the State while the Virginia manufacturer who paid the tax on capital was not required to pay such a *license* tax to sell its goods at the place of manufacture, it was denied the equal protection of the laws, its goods were discriminated against and interstate commerce was burdened. But this court held the distinction on which the classification was based "so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view." (246 U. S. 5.)

The necessary conclusion from this case is that the

manufacture of goods need not be segregated from the sale thereof for purposes of taxation in order to avoid discrimination, but that one tax may properly include the whole.

Appellant's brief (p. 13) argues that because every resident of Virginia owning any intangibles is taxed thereon under section 69 of the Tax Code (provided he does not pay a tax thereon classified as capital under section 73), and because intangibles may be classified as capital when used in a trade or business, therefore, every person paying a tax on intangibles is exempt from the peddler's license tax. But this argument overlooks the provision of section 192-b, which extends the exemption only to a *manufacturer selling goods "actually manufactured"* by him. Furthermore, "capital" as defined in section 73 includes inventories of stock on hand anywhere in the State, and various other items of property besides intangibles. It is only where the manufacturer pays a tax on all these items he possesses that he may sell the goods he makes without a peddler's license.

The statute in fact makes no distinction whatever between a resident of Virginia and a nonresident. A nonresident may manufacture in Virginia, pay the tax on capital employed in the State and this will confer on him the right to sell his products without a peddler's license. On the other hand, a resident of Virginia who desires to peddle to retailers goods manufactured by some one else must secure the license, and this is equally true whether the goods he peddles are manufactured in Virginia or elsewhere.

Furthermore, a nonresident who manufactures goods in another State may establish a place of business in Virginia as a wholesaler or distributor and sell the goods he makes, as well as those made by others, without securing a peddler's license.

Appellant states in its brief that a Virginia corporation engaged in manufacturing in another State would be taxed on his capital so employed, and, therefore, exempt from the peddler's license. But this statement overlooks the provisions of section 427 of the Tax Code, which exempts from taxation the capital of Virginia corporations not actually engaged in business in the State. Such a corporation, therefore, is not exempt from the peddler's license. No corporation engaged in business in Virginia, whether domestic or foreign, is taxable on the capital employed outside of Virginia.

The flat fee or tax charged for the itinerant peddler's license is the only practical way in which the business can be taxed. A tax based on the volume of sales would be impossible of enforcement. The itinerant peddler has no place of business in the State, and keeps no books therein from which the amount of the tax can be computed. Then again, unless a tax of this kind is *paid in advance* there is little chance of collection because the taxpayer does not remain in the State. And, furthermore, it is obvious that a tax based on volumes of sales would be utterly valueless as a regulatory measure because it would not exclude irresponsible and undesirable itinerants, which is its chief regulatory purpose. Unless the license were required to be "conspicuously displayed" on the vehicle as section 192-b does require,

it would be almost impossible for the enforcement officers to make a satisfactory check of persons actually engaged in peddling.

It is clear that no other method of taxing itinerant peddlers such as appellant is available to the State, that the challenged statute is a reasonable and proper exercise of the State's taxing power, and that it does not discriminate against the appellant.

IV.

The Challenged Statute Does Not Unlawfully Discriminate Against Appellant's Goods by Reason of Their Source or Place of Manufacture, or Otherwise.

As a general proposition of law, it may be conceded that a State by the use of its taxing power may not unlawfully or injuriously discriminate against products of another State. This rule rests upon the theory that, if a State may so discriminate, it may in effect erect a tariff wall at its borders and thus greatly impede the flow and sale of goods from one State to another so as to result in a substantial burden upon commerce between the States. However, the cases also hold that the question of whether such a discrimination in fact exists is a practical one and is not to be determined by artificial standards—that a particular statute must be analyzed together with other statutes in *pari materia* to ascertain whether it results in discrimination *as a matter of fact.*

Before considering the statutes here involved, there are certain principles well established by the decisions of this court to which attention should be called.

The leading case involving discrimination against

goods of another State is *Welton* v. *Missouri*, 91 U. S. 275. The statute of Missouri provided, says the court, that:

> "* * * whoever deals in the sale of goods, wares or merchandise, except books, charts, maps and stationery, *which are not the growth, produce or manufacture of the State,* by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. *No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product or manufacture of the State.*" (Italics supplied.)

This staute was held to be invalid because of the discriminating legislation against the goods *because* of their *"foreign character"* in that they were goods *"which are not the growth, produce or manufacture of this State."* The opinion goes on to say, speaking of *Brown* v. *Maryland*, 25 U. S. 12, 12 Wheat. 419:

> "Following the guarded language of the court in that case, we observe here, as was observed

there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation *by reason of its foreign character.* That power protects it, even after it has entered the State, from any burdens imposed *by reason of its foreign origin.* * * *" (Italics supplied.)

To the same effect is the case of *Guy* v. *Baltimore,* 100 U. S. 434, relied on by appellant. A number of other cases (not cited by appellant) applying the rule of *Welton* v. *Missouri, supra,* are reviewed in detail in *Emert* v. *Missouri, supra.*

Examination of *Welton* v. *Missouri, supra, Guy* v. *Baltimore, supra,* and kindred cases discloses that the discrimination in each of them is based on the *source* of the goods alone. For example, in *Welton* v. *Missouri, supra,* the statute afforded no *way by which goods manufactured in another State could be peddled in Missouri without a peddler's license.* The sole test in the statutes involved in all cases of this class is the *source* of the goods. If they were manufactured in the taxing State, they could be peddled there at will; if they were not so manufactured, they could not be peddled by anyone without a license.

Section 192-b of the Tax Code by no possible con-

struction makes the *source* of the goods the test of the application of the statute. It is entirely true that the *manufacturer* may not peddle them to retailers unless he has paid for the privilege by paying a tax on capital in Virginia or is a licensed wholesale merchant in Virginia, but alleged discrimination against the *manufacturer* raises a question under the equal protection clause, which has been discussed above, and not a question of discrimination against the *manufactured goods* under the commerce clause. The statute will be searched in vain for any reference to goods which "are not the growth, produce or manufacture" of Virginia, or to the "foreign character" of the goods, or any words of similar import.

As pointed out, the Statute in *Welton* v. *Missouri, supra, afforded no way by which merchandise manufactured in another State could be peddled in Missouri without a peddler's license.* This is not true of section 192-b. The section exempts from the license tax a "distributor of manufactured goods paying a State license tax on his purchases" and it also exempts a wholesale merchant "regularly licensed by this State." Appellant may sell or consign his goods to a distributor or to a wholesale merchant in Virginia, and thus the goods *manufactured in West Virginia may be peddled* to retailers by such distributor or merchant *without the license.* The *source* of the goods is not the test. The court judicially knows that hundreds of nationally advertised products *manufactured in other States* are sold in Virginia through wholesale dealers and distributors. These products may be, and in many cases doubtless are,

peddled to retailers by the wholesalers and distributors without the license required by the section. It so happens that appellant is dealing in bakery products, but that is a mere coincidence. The statute applies to *all classes of merchandise,* with a few named exceptions.

But in addition the section *allows appellant itself to peddle his West Virginia manufactured goods in Virginia without the license.* All that is necessary is that appellant establish a place of business in Virginia, not for the purpose of manufacture, but from which to distribute its goods manufactured in West Virginia. Section 188 of the Tax Code is the section imposing wholesale and retail merchants' licenses. It expressly provides how a manufacturer, either resident or nonresident, may secure a wholesaler's license in the following paragraphs:

> "* * * If a manufacturer desires to sell, at a definite place or store, other than the place of manufacture, to other persons for resale, or to institutional, commercial or industrial users, the goods, wares and merchandise manufactured by him, *then such manufacturer must take out a wholesale merchant's license,* though this definite place or store be located in the same county, city or town in which his place of manufacture is established. When a manufacturer establishes a place or store for the sale of his goods, other than at his place of manufacture, to other persons for resale, or to institutional, commercial or industrial users, the amount of the State license tax is to be measured not only by the amount of pur-

chases made by such manufacturer from others, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale; and he is required to report not only the amount of goods purchased by him from others and offered for sale, but also the amount of goods manufactured by him *either within or without this State* and offered for sale by him at his store or definite place in this State other than the place of manufacture. The cost of manufacture shall be taken as the purchase price of the goods, wares and merchandise in the case of a manufacturer who is also a wholesale merchant within the meaning of the law.

* * * * *

"A wholesale merchant, who has been duly licensed by the State, and duly licensed by the city or town, if his place of business be in a city or town, or in lieu of a license tax to the city or town, has been taxed by the city or town on the capital employed in business, *may, other than at a definite place of business, sell and deliver at the same time to licensed dealers or retailers, but not to consumers, anywhere in the State, without the payment of any additional license tax of any kind for such privilege* to the State, unless otherwise provided by law." (Italics supplied.) (Tax Code, Section 188.)

Thus appellant may establish a distributing point in

Virginia, as was done in *Armour* v. *Virginia,* 118 Va. 242, (affirmed 246 U. S. 1) pay a wholesalers' license and *peddle as an incident of his wholesale business without the challenged license his bakery products (manufactured in West Virginia) to retailers anywhere in Virginia.* It is of no significance to say that he may be subject to local licenses. This is also true with other wholesale merchants.

Further demonstrating that there is no discrimination in the section against the goods because of their source, take the case of the ordinary peddler (and appellant is simply that in Virginia) who is neither a manufacturer taxable on capital nor a wholesale merchant, but who simply purchases his merchandise for the purpose of peddling it to retailers. He is subject to the license whether the goods are the products of Virginia, West Virginia or China. The section in no respect makes the liability to the exaction depend upon the State or country of origin of the goods.

Reduced to its essentials, the gravamen of appellant's complaint is not that its products are discriminated against because of their origin, as was the case in *Welton* v. *Missouri, supra,* and other cases of that type, but that *appellant, not his goods,* is being discriminated against because *it* is not allowed to peddle them without a license in the way *it* has selected. Virginia affords appellant ample means to have its goods peddled here without the license, *either by itself or by others,* but that is not enough, claims appellant, Virginia must fashion its laws so that appellant can conduct its business here in the manner that is best adapted to its desire, profit and

convenience. No respectable authority can be cited to support such a proposition.

The recent case of *Best and Co.* v. *Maxwell* (decided by this court December 23, 1940, 61 Sup. Ct. Rep. Adv. Op. 334) is relied on in support of the proposition that a State statute may not discriminate against interstate commerce. The soundness of the proposition Virginia has never disputed. The real issue here is whether any such discrimination in fact exists, and upon this question, under the facts and statutes here involved, the *Best* case throws no light. The North Carolina statutes there considered imposed a tax of $250 on every one not a regular retail North Carolina merchant who displayed samples in any hotel room or other temporary quarters for the purpose of securing retail orders. Orders secured by Best and Company were filled by shipping direct to the customers from New York City, and the agent securing the order is what this court has denominated a "drummer". Sales made in this manner have been held by this court to constitute interstate commerce in a long line of cases, of which the leading one is *Robbins* v. *Taxing District of Shelby County,* 120 U. S. 489. On the other hand, this court has uniformly held, as has been pointed out, (*supra,* pp. 5-7) that peddling is not interstate commerce but is a local activity within the regulatory and taxing power of the State.

The North Carolina tax to which Best and Company was subjected for carrying on a pure interstate business (not subject to State regulation as a peddler is) was obviously discriminatory against that business, and, therefore, against interstate commerce which the business

constituted. Whereas Best and Company were charged $250 for the privilege of taking orders by sample in the manner indicated, a State retail merchant was given the same and other privileges and was charged only one dollar. It does not appear that the local merchant in North Carolina was subjected to any tax whatever corresponding to the Virginia merchant's license tax or the capital tax on manufacturers.

The principle stated in the *Best* case has long been well established, and, as above mentioned, is not disputed. Factually, however, that case does not, in the slightest degree, support appellant's contention that its goods are discriminated against by Virginia's system of taxation.

In spite of the fact that the court below apparently did not consider its former decision in *Commonwealth* v. *Myer,* 92 Va. 809, as having any material bearing on the case at bar, appellant persists in relying on it here. Of necessity, the case was either overruled by implication or not considered pertinent to a decision of the questions here involved. The principle established by said *Myer's* case—that Virginia may not discriminate unlawfully against goods manufactured outside the State —was recognized by the Virginia court in the case at bar, and is not disputed by Virginia here. The point is that section 192-b was considered not to discriminate against appellant's goods. Under the statute involved in the *Myer's* case, and quoted in the court's opinion, a wholesale distributor was not exempted from the license with the result that no goods manufactured outside the State could be sold by anyone in Virginia without se-

curing a peddler's license, while a Virginia manufacturer could so peddle his own goods. The court held that this operated as a discrimination against goods made outside the State.

As has been seen, the statute considered in the *Myer's* case was entirely different in terms, purpose and effect from the statute now under review. The case of *Armour and Company* v. *Virginia,* 246 U. S. 1, (which has been discussed above in relation to the question of equal protection), was properly considered by the Court below as more nearly involving the principles controlling the statute here involved with respect to the question of its alleged discriminatory effect upon goods of outside origin. Under the statute there passed on (which is now section 188 of the Tax Code, to which reference has already been made) a manufacturer *"taxed on capital"* by Virginia could sell his goods at his place of manufacture without securing a merchant's license, but a license was required if his goods were sold from a separate store established by the manufacturer. Armour and Company, a manufacturer of another State, challenged the statute on the identical grounds advanced here, namely, that its goods were discriminated against because, not being manufactured in Virginia, they could not be sold from any place of business in Virginia without a license, while the domestic manufacturer could sell his manufactured product from the place of manufacture without a license. The claim of discrimination was denied, this court saying:

> "In the second place, we are also of opinion that the interpretation given by the court below

to the statute excludes all basis for the contention that the provision of the statute imposing the license tax upon the one class and not upon the other gave rise to such discrimination as resulted in a direct burden upon interstate commerce. And this whether the statute be considered from the point of view of the power of the state to enact it inherently considered, or of the power as tested by the necessary operation and effect of the statute, if any, upon interstate commerce and the plenary and exclusive power of Congress to regulate the same.

* * * * *

"But, it is urged, the statute should be held to be a burden on interstate commerce and repugnant to the Constitution because of the disadvantage to which, it is insisted, it necessarily by way of a license tax subjected goods manufactured in another state when sold in Virginia by a merchant manufacturing the same, while no such tax was by the statute imposed on a manufacturer in Virginia selling his goods so manufactured at the place of their manufacture. But we have already tested the statute by its necessary operation and effect and found it not to be repugnant to the commerce clause. Hence this argument but repeats in a different form a contention already disposed of. It follows therefore that if the asserted disadvantage be real and not imaginary, it would be one not direct because not arising from the operation and effect of the statute, but

> indirect as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

And so with the situation here. Appellant's sole business in Virginia is peddling to retailers. It is, therefore, subject to a license tax which Virginia unquestionably may impose. If other businesses which are otherwise taxed are thus selling to retailers, as an incident of their already taxed businesses without being liable to the peddler's license, this is as the *Armour Case* says:

> "* * * a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

It is clear, that, in principle, the *Armour Case* is on all fours with the instant case, and that, with the cases therein cited, it is controlling.

Appellant also relies on *Bethlehem Motors Corporation* v. *Flynt*, 256 U. S. 421. The statute there involved, however, differs so fundamentally in its terms and in its

operation and effect from section 192-b of the Tax Code that the case can be of no persuasive authority here. The condition prescribed by the North Carolina statute was obviously discriminatory and, said the court, "cannot be satisfied by a nonresident manufacturer," with the result that "it would prevent competition with the products of the State." In *Stoolsi* v. *Minnesota,* 283 U. S. 57, the statute in the *Bethlehem Motors Case* was described as one making the difference in the amount of the tax, "depending solely on the fact of residence within or without the State", a factor entirely absent here. A resident whose sole business is peddling pays the same tax as a nonresident, and this without regard to the origin of the goods.

Appellant, realizing the damaging effect of the *Armour Case, supra,* upon its claim of discrimination against its goods, and being unable to distinguish it, suggests (R. p. 9) that it has been overruled by the *Bethlehem Motors Case.* But the *Armour Case* was not even mentioned in the opinion in the *Bethlehem Case,* and when the reasoning in the opinions in the two cases is analyzed it is plain that this court considered that the purpose, operation and effect of the two statutes were in no wise similar.

Only two cases were cited in the opinion in the *Armour Case,* but squarely in point here, *New York* v. *Roberts,* 171 U. S. 658, and *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445.

In *New York* v. *Roberts, supra,* the statute attacked taxed every corporation doing business in New York, but excepted corporations wholly engaged in carrying

on manufacture within the State. It should be pointed out here that there is no distinction in section 192-b between domestic and foreign corporations, since a foreign corporation (such as appellant) if taxable on capital for doing business as a distributor or wholesaler, may peddle without the license. The New-York statute was vigorously attacked by a corporation manufacturing its goods without New York, but doing business in that State, on the ground that the statute discriminated against such goods. The cases relied on were for the most part the very cases appellant invokes here. The court, however, denied the contention, and said this:

> "To sustain this contention, the well-known line of cases is cited wherein this court has had to deal with state legislation imposing discriminating taxes against the products of other states (citing cases).
>
> *"If the object of the law in question was to impose a tax upon produce of other states, while exempting similar domestic goods from taxation,* there might be room to contend that such a distinction was constitutionally objectionable, as tending to affect or regulate commerce between the state. But we think that, obviously, such is not the purpose of this legislation. * * *
>
> "It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such

exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state." (Italics supplied.)

The other interesting case, cited in the *Armour Case* opinion, denying the charge of discrimination against products of another State upon the same ground advanced here is *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445.

Summarizing on the question of discriminating against products of another State, it is entirely clear from the opinions of this court that the court has adopted a realistic attitude, considering each statute reviewed according to its purpose, operation and effect. No clear line of demarcation has been drawn, since the presence or absence of discrimination is a question of fact in each case. Throughout the cases, however, there is always one test that has been uniformly applied, namely, whether or not the tax, as was said in *Webber* v. *Virginia,* 103 U. S. 334, is made to depend upon the "foreign character of the articles" or, as expressed in *Welton* v. *Missouri, supra,* "imposed by reason of its foreign origin." A further study of the decided cases will also show that under the statutes struck down by this court it has been impossible for the products of another State to be peddled or sold to anyone without the tax, while the goods of the taxing State *could* be peddled or sold without the license.

Contrast the statute now before the court. The *foreign origin of the goods is not the test and appellant's*

goods may be peddled in Virginia without the license. It has been shown that appellant's goods may be sold to and in turn peddled by a distributor or wholesaler in Virginia without the license—that a great many manufacturers of other States market their products through wholesale distributors in Virginia, the court judicially knows; it has been shown that appellant itself can peddle his goods in Virginia without the license by establishing a distributing point here—the court also judicially knows that this is a common practice; it has been shown that in the case of an ordinary peddler who purchases the goods he peddles the statute makes no distinction between products of Virginia and products of other States. Under these circumstances, it would be fantastic and utterly inaccurate to say section 192-b makes the "foreign character" of the goods the test of the liability to the tax.

We have said, and now emphatically repeat, that, reduced to its essence, appellant's complaint is that Virginia has not so arranged its tax system that appellant may peddle its products here in the way *it* has chosen or as to *it* may economically appear to *its* best interest. Virginia is not required to do this by *any* constitutional provision. Appellant, doing only peddling here, in effect claims that the only way to remove the alleged discrimination against its goods is to allow it to peddle them tax free, because forsooth persons engaged in an entirely different business in Virginia may, as an incident or part of their already taxed business, peddle their goods without further tax. The contention is utterly unsound.

As has been pointed out above, it has been for many

years the policy of Virginia to allow manufacturers taxable on capital and wholesalers paying a license tax on purchasers to peddler their goods to retailers as a natural incident or part of their respective businesses.

Appellant contends that in addition to alleged discrimination against its goods by reason of their source, and aside from any questions of interstate commerce, said goods are also discriminated against by reason of their character, i. e., bakery products. The claim is based upon the exemption from the license accorded peddlers of petroleum and petroleum products, tobacco, sea food, and the grower of the agricultural products he peddles. The reasons for these exemptions from a regulatory standpoint have already been pointed out (*supra*, pp. 11-12), and much that was said there is likewise applicable from a taxation standpoint and need not be repeated.

Appellant approaches this phase of the question under the apparent belief that section 192-b is intended to apply only to peddlers of bakery products. But the statute applies to the peddling of all products manufactured or grown save those exempted.

Appellant appears particularly offended by the exemption the statute affords to peddlers of tobacco and sea food.

As to the exemption afforded peddlers of sea food, the argument is that appellant is a peddler of bakery products (although the statute does not separately classify peddlers of such products), and bakery products and sea food are both foodstuffs, and, therefore, they must be placed in the same class for tax purposes. In other

words, the contention seems to be that *all* foodstuffs must be included in one class.

Appellant overlooks the fact that peddlers or merchants may be classified according to the specific commodity in which they deal, 16 C. J. S. Const. Law, Sec. 530, 1 Cooley on Taxation (4th Ed.) p. 752, 17 R. C. L., p. 511, and that general classes may be subdivided into particular classes and licensed or taxed, *Hammond Packing Co.* v. *State of Montana,* 233 U. S. 331, (oleomargarine taxed, butter exempted); *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, (tax on meat-packing house, but not on merchant selling products of meat-packing house). Appellant might as well argue that all merchandise must be placed in the same class. If anthracite coal may be classified separately from bituminous coal (both fuels), the one being taxed and the other exempt, *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; if a laundry employing more than two women may be licensed and a laundry employing two women exempt from license, *Quong Wing* v. *Kirkendall,* 223 U.S. 59; if a manufacturer of fertilizer from *herring* may be taxed and a manufacturer of fertilizer from other *fish* not taxed, *Alaska Fish Salting & By-Products Co.* v. *Smith,* 255 U. S. 44; if a merchant operating one store may be separately classified from a merchant doing the same thing in two stores, *Indiana* v. *Jackson,* 283 U. S. 527; if a State may separately classify for taxation money on deposit in banks outside the State and money on deposit in banks within the State, *Madden* v. *Kentucky,* 309 U. S. 83 (overruling *Colgate* v. *Harvey,* 296 U. S. 404, relied on by appellant in its brief, p. 12), then it is confidently asserted that two commodities so different

as sea food and bakery products may be separately classified for license tax purposes. See also *Leonard* v. *Maxwell,* 216 N. C. 89, 3 S. E. (2nd) 316, where the validity of the classification of *sea food* for taxation is sustained.

Appellant is unfortunate in its selection of the only case cited in attacking the exemption of peddlers of sea food, *Smith* v. *Cahoon,* 283 U. S. 553. The statute involved in that case was one *regulating motor vehicle carriers.* The purpose of the regulation was to provide "suitable protection for the public against injuries through the operation on its highways of carriers for hire * * *". The statute exempted from its requirements *carriers* of farm products and certain other commodities. The court in effect held that, considering the purpose of the statute, the public needed just as much protection from *motor vehicles using the highways* carrying one commodity as another. The distinction between the statute considered in that case and the one involved in the case at bar is quite obvious. It was recognized by this court in *Hicklin* v. *Coney,* 290 U. S. 169, sustaining a South Carolina statute exempting from the payment of a license fee imposed on contract motor vehicle carriers "farmers or dairymen hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points." *Continental Baking Co.* v. *Woodring,* 286 U. S. 372, sustained a statutory exemption in favor of one "who is carrying his own livestock and farm products to market, or supplies for his own use in his own motor vehicles".

As to the classification of tobacco, except for the fact that it is not a food, what has just been said relative to sea food equally applies. See, also, the case of *Ex parte Asotsky* (Mo.) 5 S. W. (2nd) 22, and an extensive note in 62 A. L. R. 105, where it is said that "the decisions, almost without exception, support the right of the state * * * to put tobacco dealers in a separate class from dealers in other commodities for taxation purposes * * *".

Clearly the appellant has shown no discrimination whatsoever against its goods by reason of their source, and no unlawful or harmful discrimination by reason of their character as bakery products.

CONCLUSION

It is respectfully submitted that the business conducted by appellant in Virginia as a peddler to retailers is a purely local one, and does not constitute interstate commerce but is clearly within the regulatory police power and taxing power of the State; that the challenged statute is a valid and proper exercise of such powers by the State, does not injuriously or unlawfully discriminate against the appellant or its goods, and does not deny equal protection of the laws or burden interstate commerce.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 676.—October Term, 1940.

Caskey Baking Company, Inc., Appellant, *vs.* Commonwealth of Virginia.	Appeal from the Supreme Court of Appeals of Virginia.

[April 28, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, a corporation of West Virginia, has its principal office and place of business in Martinsburg in that State. As a foreign corporation registered in Virginia it has paid the latter State an annual registration fee and an income tax on its net profits allocable to its Virginia business. It makes bread which it sells to grocers and other retailers in territory adjacent to Martinsburg, including Winchester and other places in Virginia. Appellant's trucks carry the bread into Virginia where they serve regular routes at regular intervals. The drivers call only on regular customers, inquire of each how much bread he needs and, in response to his order, take it from the truck and deliver it to the customer. Thus each such transaction in Virginia is a sale and delivery in that State to a regular customer.

The company has no property permanently located in Virginia and no place of business in the State, except that, as required by the statute respecting registered foreign corporations, it maintains an office in the State where claims against it may be audited, settled, and paid.

The appellant was convicted for making a sale in Virginia without having procured a license pursuant to § 192 b[1] of the Tax Code of Virginia and a fine was imposed. The Supreme Court of Appeals affirmed the conviction.[2]

[1] Acts of Virginia, 1932, p. 376, 1938, p. 440; Va. Tax Code, 1936, 192 b, Michie, p. 2458, 1940 Supp. 472.

[2] — Va. —, 10 S. E. (2d) 535.

So far as material the statute provides: "There is hereby imposed an annual State license tax on every person, firm and corporation (other than . . . a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller. Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants." The annual fee is $100 for each vehicle used in the business.

It is admitted that appellant was not a manufacturer taxable on its capital stock, nor a distributor of manufactured products paying a state license tax on its purchases, nor a licensed wholesale dealer, and did not, therefore, come within any of the classes exempted by the Act.

In the State courts, and here, the appellant challenged the statute as contravening the commerce clause and the equal protection clause of the federal Constitution. Its position is that it is doing either an interstate business which the State may not burden by imposing a license tax, or an intrastate business as to which the exaction works a forbidden discrimination. We hold both contentions untenable.

1. While the transportation of bread across the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the Act hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts.[3] The appellant, however, urges that the Act discriminates against interstate commerce by exempting from its operation the privilege of sales by manufacturers paying tax on their capital employed in manufacture in Virginia. It is said that if its bakery were situate in Virginia the appellant would have the benefit of this exemption and, since it is not, the marketing of appellant's goods shipped into the State is the target

[3] Machine Co. *v.* Gage, 100 U. S. 676; Emert *v.* Missouri, 156 U. S. 296; Wagner *v.* Covington, 251 U. S. 95.

of a hostile discrimination. But the argument overlooks the fact that peddlers resident in Virginia who buy their goods within the State, or buy or procure them from extra-state sources, are alike subject to the Act. The contention that the Act discriminates against interstate commerce by virtue of the exemption in question is negatived by our decisions.[4]

2. Examination of the Tax Code of Virginia discloses that the Act in question is but one portion of a comprehensive scheme of taxation. Manufacturers who sell their own products pay a tax on capital, which the State deems sufficient to cover all their activities, including the vending of the goods.[5] Wholesale merchants who have a fixed place of business pay a license tax measured by a percentage of all their purchases; and if they are also licensed by the town or city in which they have their place of business or, in lieu thereof, are taxed by such town or city on the capital employed in the business, they may sell and deliver at the same time and place anywhere in the State without payment of any additional license tax.[6] Every distributing house, whether operated by a manufacturer or wholesaler for distributing goods amongst the owner's retail stores must be licensed and pay the same tax as if it were a wholesaler.[7] Retail merchants[8] and peddlers at retail[9] must be licensed and pay license taxes,—the former a percentage of the value of his purchases and the latter a fixed annual fee. Those who have no fixed place of business, who peddle their wares only to licensed dealers or retailers at the places of business of the latter, fall into none of the described classes. As the court below points out, were it not for § 192b, such peddlers would be the only vendors in Virginia to escape some form of taxation.

Peddlers at wholesale are not entitled to be licensed and taxed on the same basis as other vendors, as respects either form or amount. As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classi-

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[4] Armour & Co. *v.* Virginia, 246 U. S. 1, and cases therein cited.

[5] Tax Code of Virginia, 1936, §§ 73, 188, Va. Code, 1936, Michie, pp. 2416, 2451.

[6] Tax Code of Virginia, § 188, Va. Code, 1936, Michie, pp. 2451-2452.

[7] *Ibid.*

[8] *Ibid.*

[9] *Id.*, § 192, Va. Code, 1936, Michie, p. 2457.

fying businesses for taxation or impose any iron rule of equality.[10] Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, 537, and cases cited.